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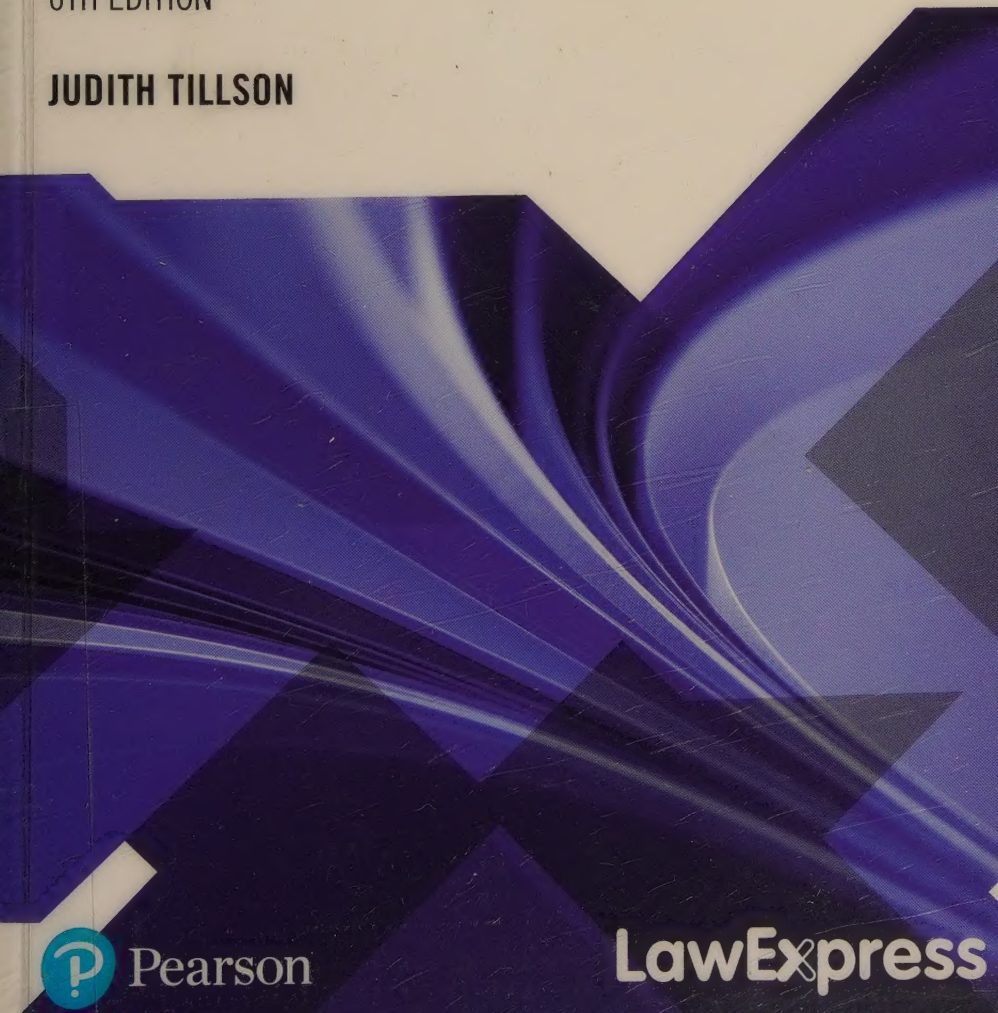

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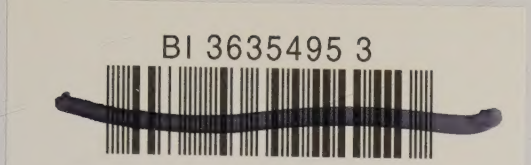
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6th edition

Judith Tillson, Barrister

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5 The National Archives: Section 12(1), Unfair Contract Terms Act 1977; **6 The National Archives:** Unfair Contract Terms Act 1977; **6 The National Archives:** The Unfair Terms in Consumer Contracts Regulations 1999; **8 and 9 The National Archives:** Section 2(2), Consumer Rights Act 2015; **8 The National Archives:** Section 2(3), Consumer Rights Act 2015; **10 LexisNexis:** The court, *Lloyd Schuhfabrik Meyer & Co GmbH* v *Klijsen Handel BV* C-342/97 [1999] All ER (EC) 587; **12 The European Union:** Directive 2005/29/Ec of the European Parliament and of the Council of 11 May 2005; **12 The National Archives:** The Consumer Protection from Unfair Trading Regulations 2008; **15 UK Parliament:** Molony Committee on Consumer Protection, 1961; **24, 51 and 58 The National Archives:** Section 13(1), Sale of Goods Act 1979; **25–26 The National Archives:** The Sale of Goods Act 1979; **27 Incorporated Council of Law Reporting:** Lord Bridge, *Scally v Southern Health and Social Services Board* [1992] 1 AC 294; **30 Incorporated Council of Law Reporting:** Lord Denning, *J Spurling Ltd* v *Bradshaw* [1956] 1 WLR 461; **37 United Kingdom Supreme Court:** *Office of Fair Trading* v *Abbey National plc* [2009] UKSC 6; **39 United Kingdom Supreme Court:** Lord Mance, *Office of Fair Trading* v *Abbey National plc* [2009] UKSC 6; **51 The National Archives:** Section 2(1), Sale of Goods Act 1979; **51 The National Archives:** Section 61(1), Sale of Goods Act 1979; **53 The National Archives:** Section 4, Sale of Goods Act 1979; **53 The National Archives:** Section 8, Sale of Goods Act 1979; **54 The National Archives:** Section 15, Sale of Goods Act 1979; **56 The National Archives:** Section 12(1), Sale of Goods Act 1979; **60 Incorporated Council of Law Reporting:** Lord Atkin, *Arcos Ltd* v *E. A. Ronaasen & Son* [1933] AC 470; **63 The National Archives:** Section 13(3), Sale of Goods Act 1979; **64 The National Archives:** Section 14(2), Sale of Goods Act 1979; **65, 74, 75 and 243 The National Archives:** Consumer Rights Act 2015; **66 The National**

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Introduction

Many students study consumer and commercial law as discrete modules. Some students may study one rather than the other. However, this book treats them as complementary topics by examining areas common to both. Consumer and commercial law covers a wide range of subjects so module content will vary between institutions, but several topics will be common features, including sale of goods, agency law, credit, product liability, product safety and unfair trading practices. Because of the increasing influence of online contracts and distance selling, you are likely to be expected to appreciate the legal challenges presented by this mode of contracting. No doubt individual lecturers will place greater emphasis upon particular topics in this diverse area. You should always refer to your lecturer or tutor and your course materials with any questions on what you will be expected to cover.

Another factor to bear in mind in preparing for the exam is that, inevitably, several topics will overlap and cannot be revised as discrete units. It is important to appreciate that studying consumer and commercial law will require that you have a sound basis in contract law, especially misrepresentation, unfair contract terms and remedies for breach.

The subject lends itself to problem questions which provide an opportunity for the examiner to assess your understanding of how different aspects of consumer and commercial law interlink. Don't be surprised to find that a problem on a topic such as product liability may also encompass aspects of sale of goods, negligence and privity. Likewise, questions calling for an analysis of unfair contract terms will expect you to be able to demonstrate detailed knowledge of aspects of sale of goods, misrepresentation and the supply of services. You will be expected to show clear understanding of the degree of statutory protection offered to those dealing on a commercial as well as consumer basis. When dealing with such multi-faceted problem questions, it is easy to digress into areas that are not relevant; it is also difficult to gauge which areas require a greater level of detailed analysis. Some questions may help you in this respect by allocating marks to different sections. The most difficult problems are those that include a range of issues within one detailed scenario. Always devise an outline plan to ensure that you deal with all relevant issues in a systematic and structured manner. It is a good idea to identify an issue, explain it and then apply it to the facts given.

With essay questions you should ensure that you understand what the question requires before outlining your plan. Essay questions tend to expose those who have a superficial understanding of a topic, as they call for detailed explanation of legal principles with application of case law and statute as well as critical comment. You will be expected to be able to highlight areas for criticism and potential reforms. You may be required to address a specific reform and carry out an evaluation, using recent authority, as to whether or not it has been effective. A likely example would be the reform of the area of unfair trading practices. Keep to the issue by referring to the question and submitting suitable comment (based on your evaluation) where appropriate. Whether you are analysing a problem or writing an essay, make sure that you submit a conclusion.

This book is designed as a revision guide, not as a substitute for a textbook or your course notes. In order to promote quick understanding and effective revision, it gives you a clear overview of key topics in consumer and commercial law. It also provides a guide to suitable resources to develop a critical approach to examinations and assignments. The book focuses on common areas of misunderstanding and confusion, such as concepts of consumer status, the different heads of liability in product liability and the difference between sale by description and misrepresentation. In order to help you develop a confident attitude towards examinations, guidance is given in each chapter with regard to revision and exam tips, pointing out difficult areas and suggesting good approaches to a range of sample questions.

Finally, it is important that you are aware of progress on the implementation of the European Directive on Consumer Rights. The Directive merges four existing EU Consumer Directives, namely: Sale of Consumer Goods and Guarantees (99/44/EC), Unfair Contract Terms (93/13/EEC), Distance Selling (97/7/EC) and Doorstep Selling (85/577/EEC). By means of a process of codification, the law in these areas will eventually be updated to reflect technological changes in commerce and to try to overcome common problems with distance selling. With these aims in mind the Consumer Rights Bill was introduced into Parliament in June 2013 and resulted in the introduction of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, the Consumer Protection (Amendment) Regulations 2014 and the Consumer Rights Act 2015 which aim to clarify and consolidate legislation covering distance and doorstep selling, rights of redress for victims of unfair trading practices, the sale and supply of goods (including digital content), unfair contract terms and powers of enforcement. Naturally there will be some inevitable overlap between the new reforms and existing legislation. The table below is designed to clarify the effects the Consumer Rights Act 2015 has had on pre-existing legislation.

Effect of the CRA 2015 on existing legislation

The provisions in the existing legislation listed in Table 0.1, which cover B2C (business-to-consumer) contracts only, have been repealed. The provisions that relate to other types of contracts (for example, contracts between businesses) remain in the existing legislation.

Table 0.1 Effect of CRA 2015

Pre-existing Legislation	Changes
Supply of Goods (Implied Terms) Act 1973	The Consumer Rights Act 2015 replaces any provisions made in this Act for B2C contracts. It has been amended so that it covers B2B contracts and C2C contracts only
Sale of Goods Act 1979	For B2C contracts have been mainly replaced by the Consumer Rights Act 2015 but some provisions of SGA still apply, for example: rules that are applicable to all contracts of sale of goods (as defined by that Act – essentially these are sales of goods for money), regarding matters such as when property in goods passes. The SGA still applies to B2B contracts and to C2C contracts
Supply of Goods and Services Act 1982	The Consumer Rights Act 2015 replaced any provisions this Act made for B2C contracts. The SGSA has been amended so that it covers B2B contracts and C2C only
Unfair Contract Terms Act 1977	The Consumer Rights Act 2015 replaced the provisions made by this Act in respect of B2C contracts. The UCTA has been amended to cover B2B and C2C contracts only
Unfair Terms in Consumer Contracts Regulations 1999	These have been repealed and replaced by the Consumer Rights Act 2015
Sale and Supply of Goods to Consumers Regulations 2002	These have been repealed and replaced by the Consumer Rights Act 2015

At the time of writing, the Brexit negotiations are still underway and you should be aware of the legal implications of Brexit for commercial law. Where legislation takes the form of an Act of Parliament, there is unlikely to be much, if any change. However, in the case of legislation derived from the EU in the form of Regulations there remains some uncertainty as to any changes that might ensue as a result of Brexit. The European Union (Withdrawal) Act became law on 26 June 2018. Section 1 states that the European Communities Act 1972 will be repealed on exit day which was agreed finally as 31 January 2020 at 11.00 pm. Following exit day, there will be a transition period during which further negotiations will be ongoing until the final withdrawal date of 31 December 2020. While most existing legislation will be copied over into UK domestic law to ensure a smooth transition, it will be left to Parliament to amend or repeal laws depending on the future relationship the UK may have with the EU.

Revision Note

- Use this book to cement your knowledge of key issues in consumer and commercial law.
- Be aware that there will be overlap between areas of consumer and commercial law – these topics cannot be studied as discrete entities.
- Remember that this guide is intended as an aid to understanding and revision. You should use your course materials, textbooks and other resources to extend your knowledge.
- Concentrate your revision on preparing to answer exam questions – particularly how you will construct your answers in an exam.

Throughout your revision, use the questions on the companion website to check your understanding of the subject, and to identify areas where you may want to focus your revision.

Guided tour

How to use features in the book and the companion website.

Understand quickly

Topic maps – Visual guides highlight key subject areas and facilitate easy navigation through the chapter. Download them from the companion website to pin on your wall or add to your revision notes.

Key cases and key statutes – Identify and review the important elements of the essential cases and statutes you will need to know for your exams.

Key further reading – These carefully selected sources will extend your knowledge, deepen your understanding, and help you to earn better marks in coursework and exams.

Glossary – Forgotten the meaning of a word? This quick reference covers key definitions and other useful terms.

Test your knowledge – How well do you know each topic? Test yourself with quizzes tailored specifically to each chapter.

Revise effectively

Revision checklists – Identify essential points you should know for your exams. The chapters will help you revise each point to ensure you are fully prepared. Print the checklists from the companion website to track your progress.

Flashcards – Test and improve recall of important legal terms, key cases and statutes. Available in both electronic and printable formats.

Take exams with confidence

Sample questions with answer guidelines – Practice makes perfect! Consider how you would answer the question at the end of each chapter, then refer to the accompanying answer guidance. Try out additional sample questions online.

Assessment advice – Use this feature to identify how a subject may be examined and how to apply your knowledge effectively.

Impress your examiner – Impress your examiners with these sources of further thinking and debate.

Exam tips – Feeling the pressure? These boxes indicate how you can improve your exam performance when it really counts.

Don't be tempted to – Spot common pitfalls and avoid losing marks.

You be the marker – Evaluate sample exam answers and understand how and why an examiner awards marks.

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1

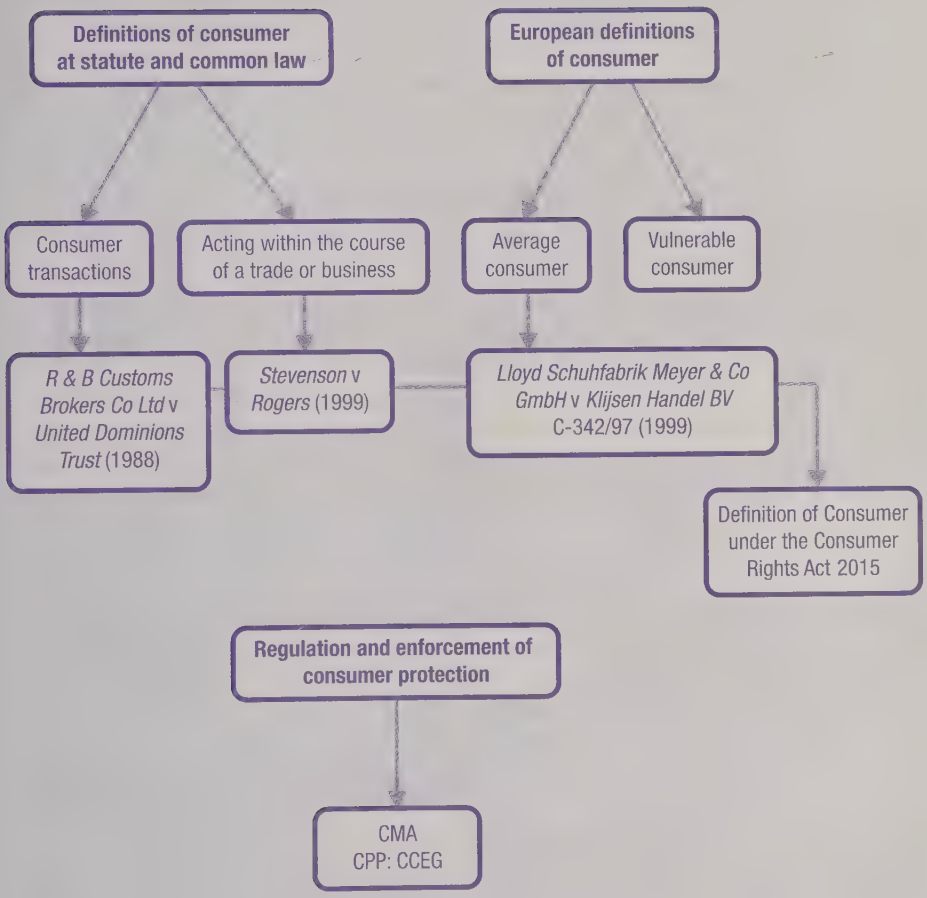
The need for consumer protection

Revision checklist

Essential points you should know:

- Why consumers need protecting in commercial transactions
- The historical absence of a uniform statutory definition of consumer
- How case law has extended definitions of consumer status
- The definition of consumer within the Consumer Rights Act 2015
- How European law definitions compare with those in English law
- The extent to which commercial transactions can be regulated

Topic map


Definitions of consumer at statute and common law
European definitions of consumer
Consumer transactions
Acting within the course of a trade or business
Average consumer
Vulnerable consumer
R & B Customs Brokers Co Ltd v United Dominions Trust (1988)
Stevenson v Rogers (1999)
Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV C-342/97 (1999)
Definition of Consumer under the Consumer Rights Act 2015
Regulation and enforcement of consumer protection
CMA
CPP: CCEG

A printable version of this topic map is available from **go.pearson.com/uk/lawexpress**

Introduction

Because consumers have the potential to be exploited by unscrupulous traders they receive greater protection from the law.

So, under the aegis of the European Union, the UK has increased regulation by introducing legislation, codes of practice and powers of enforcement by public authorities. By regulating transactions between business and consumers, most recent reform has indeed afforded the consumer greater protection, but these reforms also need to include small and medium-sized enterprises, so they can compete on equal terms. Bear in mind that a customer's status in a commercial transaction will determine the level of protection given to them.

Assessment advice

Essay questions

The question may take the form of a quotation you are invited to comment upon. It is important to show, therefore, an understanding of the rationale behind consumer protection and why a party might prefer to achieve consumer status in a transaction. When describing various statutory definitions of consumer status, always highlight the potential loopholes in a definition by comparing and contrasting it with any other apt definition. Always use case law to illustrate how the courts utilise the definitions to reflect context, and take the opportunity to comment upon any discrepancies that may exist between the cases.

Problem questions

Consumer status issues in problem questions usually have to be interpreted alongside exclusions of liability for defective products or services, and will involve a detailed analysis of any effects that unfair terms' legislation has on consumers and businesses, examples of which can be found in Chapter 3.

Problems with the definition of a consumer

Until the introduction of the Consumer Rights Act 2015 (CRA) there was no generic definition on how a consumer should be referred to in consumer law. Most common reference to the status of a consumer was in respect of a term that described

a behavioural relationship between suppliers and receivers of goods and services. Statutory attempts to give a definition of consumer status were often decided by such implicit phrases as 'acting in the course of a business' or 'dealing as a consumer'. While the Unfair Contract Terms Act 1977, s. 12(1) (UCTA) recognised a consumer only indirectly as a consequence of the trading behaviour that emerged from a transaction, the Unfair Terms in Consumer Contracts Regulations 1999, reg. 3(1) (UTCCR) and the Sale and Supply of Goods to Consumer Regulations 2002, reg. 2 (SSGCR) defined a consumer as a natural person whose trading behaviour had a direct bearing on the commercial transaction. It might well be that because consumer protection is given by potentially imposing criminal sanctions on traders, as well as offering civil remedies to consumers, a standardised definition for practical use had not been found.

Exam tip

When outlining the definitions given above, try to show your understanding of their meaning by citing everyday examples of consumer transactions whereby a consumer deals with another party who is carrying out their trade or business. Then distinguish the definitions given by the former regulations from those given by the Unfair Contract Terms Act 1977 by emphasising that the consumer should be considered a natural, rather than an artificial person, i.e. a company. It may be worth commenting on what the situation might be were a natural person to buy domestic goods for use within their trade or profession. This will show your awareness of the possible conflicts within the former statutory definitions. A statutory definition was likely to change according to whether or not it conferred criminal liability (Consumer Protection from Unfair Trading Regulations 2008) or rights to consumers (Sale of Goods Act 1979) or restricted the common law rights of traders (Unfair Contract Terms Act 1977).

Definitions of a consumer according to UCTA 1977 and UTCCR 1999

There was some difference between the definition of a consumer formerly given by the Unfair Contract Terms Act 1977 and that provided by the now repealed Unfair Terms in Consumer Contracts Regulations 1999, as listed in Table 1.1.

Table 1.1 Definitions of a consumer

Unfair Contract Terms Act 1977, s. 12(1)	The Unfair Terms in Consumer Contracts Regulations 1999, reg. 3(1)
A party to a contract 'deals as consumer' in relation to another party if – (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and (b) the other party does make the contract in the course of a business; and (c) in the case of a contract governed by the law of sale of goods or hire purchase, or by s. 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.	'Consumer' means any *natural person* who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession.

Of course, because of the lack of a standard definition of 'consumer' it was not always clear when a party was dealing as a consumer rather than in a business capacity.

Impress your examiner

Prior to the Consumer Rights Act 2015 the courts discovered loopholes in the statutory definitions: notably when a commercial enterprise bought goods intended for part-business, or part-domestic, use. Now examine the connection between the terms 'consumer transaction' and 'acting in the course of a business'. In particular, compare and contrast the following two key cases which examined the notion of dealing in the course of a business to determine the existence of a consumer transaction. The decisions may indicate how, in borderline cases, dealing as a consumer applies to receiving, rather than supplying, goods. See Dobson (2004); MacDonald (1999); de Lacy (1999).

The following cases illustrate that identifying a party as a consumer in a transaction proved to be problematic.

'Consumer transaction' or 'acting in the course of a business'

R & B Customs Brokers Co Ltd v *United Dominions Trust Ltd* [1988] 1 All ER 847

Facts

A married couple, who ran a private freight company, bought a second-hand car for their personal and business use. It soon became apparent that the car was unsatisfactory and not fit for its purpose, and so they sought a refund under s. 14(2) and (3) of the Sale of Goods Act 1979. In response to this, however, the defendants claimed to exclude liability under s. 6(3) of the Unfair Contract Terms Act 1977, stating that the contract was not a consumer transaction at all as defined by s. 12 of UCTA 1977.

Legal principle

The purchase of the car was merely incidental to the couple's freight business and in the absence of a regular course of dealing for just such a purchase, the court held that they bought the car as consumers.

Analysis

Of course, it became obvious that this decision could lead to businesses claiming consumer status in order to obtain consumer protection for the purchase of goods for business use. To avoid this loophole the definition of consumer status has been refined by more recent legislation to indicate that in order to achieve consumer protection, goods must be bought *wholly or mainly* for consumer use. (See the Consumer Rights Act 2015 s. 2(3) below.)

Stevenson v *Rogers* [1999] 2 WLR 1064

Facts

The defendant, a self-employed fisherman for over 20 years, sold his boat to the claimant. But the boat was not satisfactory. The court had to decide whether the sale was carried out in the course of a business, as the seller was a 'man of the sea', but not a boat salesman as such.

Legal principle

It was decided that the obligation to supply goods of satisfactory quality would be imposed on every trade seller, irrespective of whether or not they habitually supplied goods of that type, i.e. including a boat for whatever purpose a prospective buyer had in mind for its use, over and above the seller's. The sale was held to be in the course of a business because it was the defendant's business property that was being sold. ▶

Analysis
It is worth referring to Macdonald's (1999) article, 'In the Course of a Business – A Fresh Examination', listed at the end of this chapter, in which she indicates that it is easier to acquire consumer status when a business buys goods rather than sells them. Note the definition of a trader provided by the Consumer Rights Act 2015 s. 2(2) – this widens the definition to include 'acting for purposes relating to [one's] trade . . . or profession' and thereby upholds the decision in *Stevenson* v *Rogers*.

It is interesting to contrast the definition of 'consumer' provided by penal statutes such as the now repealed Trade Descriptions Act 1968. The following case gives an example of how the term 'consumer' was interpreted in a criminal context.

Davis v *Sumner* [1984] 1 WLR 1301

Facts
The defendant, a self-employed courier, sold his car, which he had used as a courier, applying a false description to the mileage. He would only be liable for an offence if it could be shown that he sold the car 'in the course of a trade or business'.

Legal principle
It was decided by the House of Lords that the defendant had not committed an offence because he was not involved in the business of selling cars.

Analysis
Where there is potential criminal liability for an action on the part of a business, the court was less likely to deem that a seller was acting in the course of a business because liability is so strict. However it is interesting to note the changes to the definition brought in by the Consumer Protection from Unfair Trading Regulations 2008 (which introduces criminal liability for unfair trading) whereby reg. 2 defines a trader as any natural or legal person acting for purposes relating to his trade, business, craft or profession. This matches the definition given by the court in *Stevenson* v *Rogers* (see above).

Definition of a consumer under the Consumer Rights Act 2015

Consumer Rights Act 2015 s. 2(3)

'Consumer' means an individual acting for purposes that are *wholly* or *mainly* outside that individual's trade, business, craft or profession.

This wider definition is intended to avoid the problems of conflicting interpretations of consumer status where individual members of companies deal in products that may be used outside their trade or profession. Of course according to s. 2(4) of the CRA 2015 a trader, to avoid the provisions of the Act, must prove that an individual who claims to be a consumer was not acting for purposes wholly or mainly outside the individual's trade, business, craft or profession.

How, then, does one deal with 'consumer' status when dealing with exam questions?

Impress your examiner

If a question requires you to analyse the term 'dealing as a consumer', in conclusion you could point out that because consumer protection is achieved by means of criminal sanctions as well as civil remedies, a standard definition may not always be practical. In the past the courts have not been so willing to impose criminal penalties on defendants trading in certain circumstances and, therefore, were less likely to offer consumer protection to the injured party. However, it is interesting to note how the Consumer Rights Act 2015 defines a trader and whether or not this will make any difference to the interpretation of acting 'within the course of a business'.

Consumer Rights Act 2015 s. 2(2)

'Trader' means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.

European definition of consumer

The European Union, while using a definition similar to that of the now repealed Unfair Terms in Consumer Contracts Regulations, has introduced the concepts of the 'average consumer' and the 'vulnerable consumer' into consumer law by implementing the Unfair Commercial Practices Directive 2005/29/EC (UCPD) via the Consumer Protection from Unfair Trading Regulations 2008 (CPUTR).

Average consumer

The concept of the average consumer in a European-wide context has to take into account the social, cultural and linguistic practices condoned in a state's **consumer transactions**.

Vulnerable consumer

Vulnerable consumers are those who are particularly vulnerable to exploitation and only receive protection should they belong to a targeted group who are unable to make reliably informed decisions on their own behalf, such as is the case of the young, old, infirm or credulous.

European case law

In addressing the issue of how an average consumer might react to misleading commercial practices, the courts have looked at consumer transactions carried out by the average consumer in their particular social, cultural and linguistic context.

Lloyd Schuhfabrik Meyer & Co GmbH v *Klijsen Handel BV (Case C-342/97)* [1999] All ER (EC) 587

Facts

Lloyd Schuhfabrik of Germany had distributed shoes since 1927 under the registered name Lloyd, after using various signs as trade marks. The defendant, Klijsen, had distributed leisure shoes under the registered name Loint since 1970, and in Germany, since 1991. Klijsen had registered its mark in the Benelux states in 1995 and also applied to register it in Germany. The claimants, Lloyd, opposed the application and brought proceedings against Klijsen under the German Trade Mark Act. Klijsen argued that there was no likelihood of confusion between the names Lloyd and Loint.

Legal principle

The German court asked for a referral to the European Court of Justice, which ruled that aural similarity between trade marks may create confusion in the mind of the consumer, and the greater the similarity of goods, the more likely it would create confusion. In assessing the likelihood of confusion, the court must consider the desire an average consumer has towards the values expected of certain types of goods. The court recognised that 'the average consumer's level of attention is likely to vary according to the category of goods and services in question'. Nonetheless, the court assumed that all average consumers buying shoes would approach their purchase with the same level of recognition.

Analysis

It is interesting to note AG Campos Sánchez-Bordona's opinion in *Orange Polska (Case C-628/17)* [2019] EUECJ, where clarification was sought upon

how an average consumer might be influenced into entering into a commercial transaction albeit under the potentially undue influence of an agent of the seller. (See Chapter 11 for further comment on *Lloyd Schuhfabrik Meyer & Co GmbH* v *Klijsen Handel BV (Case C-342/97)*).

There is a difference between the UK definition of consumer and that introduced by the legislation emanating from Europe.

Impress your examiner

It is important to appreciate that the concept of the average consumer is not principled, but subject to the product marketed and context of transaction, as well as to any cultural practices held over consumer agreements. As for offering vulnerable consumers protection, assistance will only be given when the vulnerable consumer is said to belong to a targeted group. An example would be where a trader is selling toys to children or health products specific to the elderly. Should a vulnerable consumer belong to a group of average consumers, for example, an elderly person buying general health products, then that consumer's reactions will be treated in the same manner as those of an average consumer (Twigg-Flesner *et al.* (2005) para. 3.12, p. 41).

The European definitions of 'consumer' will be examined again when dealing with unfair trading practices in Chapter 11 where the Unfair Commercial Practices Directive 2005/29/EC and the Consumer Protection from Unfair Trading Regulations 2008 are dealt with in more detail.

Don't be tempted to . . .

Take care not to underestimate the importance of the 2008 Regulations. These Regulations on unfair trading have replaced the Trade Descriptions Act 1968 and cover *criminal*, rather than *civil*, liability.

As the 2008 Regulations implement the Council Directives, it is interesting to make a comparison between the Directive and Regulations to see how far the definition of consumer given in the former matches that in the latter. See Table 1.2 below.

European definition of consumer in the Directive and 2008 Regulations

Table 1.2 European definitions of a consumer

Unfair Commercial Practices Directive 2005/29/EC	Consumer Protection from Unfair Trading Regulations 2008
Article 2(a) 'consumer' means any natural person who . . . [i]s acting for purposes which are outside his trade, business, craft or profession	**Part 1, reg. 2(1)** 'consumer' means any individual who in relation to a commercial practice is acting for purposes which are outside his business
Recital Note (18) . . . this Directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors – but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group	**Regulation 2(2)** In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect
Recital Note (19) Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible . . . in a way that the trader can reasonably foresee	**Regulation 2(5)** In determining the effect of a commercial practice on the average consumer: (a) where a clearly identifiable group of consumers is particularly vulnerable to the practice . . . Because of their mental or physical infirmity, age or credulity in a way which a trader could reasonably be expected to foresee

Exam tip

Of course, as the Consumer Protection from Unfair Trading Regulations 2008 implemented the Unfair Commercial Practices Directive 2005/29/EC, they are likely to be interpreted to give effect to what the Directive requires.

Regulation of trading practices

So far we have considered statutory control of commercial practices. Public authorities exercise administrative control of commercial practices, working in collaboration with private and voluntary agencies. While such public authorities have been given statutory power to regulate traders, private and voluntary bodies tend to operate according to codes of practice, which supplement statutory controls.

Consumer protection agencies

Since April 2014 the Competition and Markets Authority has carried out the duties of the former Office of Fair Trading and coordinates the working of a range of partner agencies known as consumer protection partnerships. Table 1.3 gives an outline of the partner agencies and their roles.

Table 1.3 Consumer protection partnerships

Body	Remit
The Department for Business, Energy & Industrial Strategy (BEIS)	Government lead for consumer protection policy within the UK
Trading Standards Services (TSS)	Enforcement, threat assessment – local, regional and national (for England and Wales, Scotland and Northern Ireland)
Trading Standards Institute (TSI)	Business education and Consumer Codes Approval Scheme (CCAS)
Competition and Markets Authority (CMA)	Enforcement to address systemic failures in markets where market-wide implications for consumer protection require deterrence or consumer compensation; UTCCRs enforcement leadership, enforcement and business education
Citizens Advice Consumer Service	Consumer advocacy, education and provision of consumer advice including a Citizens Advice Consumer Helpline

Enforcement powers

To avoid duplication of work the CMA shares most of its consumer protection powers with a number of other agencies in specific economic sectors. Accordingly,

the Consumer Concurrencies Group (CCG) has been created to improve clarity and share best practice where areas of responsibility might overlap. These powers will be revisited in Chapters 8 and 11.

Concurrent consumer enforcement groups

These bodies (see Table 1.4) tend to focus on their specific areas of trade and industry.

Table 1.4 Consumer enforcement groups

Organisation	Remit for regulation
Advertising Standards Authority	Advertising
Civil Aviation Authority	Aviation
CMA	Cross economy
Financial Conduct Authority	Financial services
Ofcom	Communications
Office of the Rail Regulator	Railways
Ofgem	Energy
Ofwat	Water
Payphone Plus	Premium rate (or phone paid) telephone services in UK
TSS	Cross economy
Which?	Cross economy – limited consumer enforcement powers in relation to Part 8 of Enterprise Act 2002

Exam tip

You should be aware of the reforms that have emanated from the Consumer Rights Bill which was introduced into Parliament in June 2013 (now the 2015 Act). This Bill aimed to clarify and consolidate legislation covering distance and doorstep selling, and rights of cancellation, as well as the sale and supply of goods (including digital content), unfair contract terms and powers of enforcement. When attempting questions on these topics, you must be aware of how far these aims have been achieved by any resulting legislation.

Alternative Dispute Resolution

The government is keen to facilitate the use of ADR as a means of resolving consumer disputes. With this in mind the following legislative measures were introduced between July 2015 and January 2016:

- Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI2015/542) 9 July 2015
- Alternative Dispute Resolution for Consumers (Amendment) Regulations 2015 (SI2015/1392) 9 January 2016
- Online Dispute Resolution Regulation (2013/524) 9 January 2016 (note forthcoming amendment below)

These regulations lay down the obligations on any business that is either legally obliged to use or which has committed itself to use a certified ADR scheme, to provide information about the scheme on their website and in any contractual terms they have with consumers. In the event of an unresolved complaint, they must direct the consumer to an appropriate certified ADR scheme and let the consumer know whether they agree to or are obliged to use the scheme. These requirements have applied since 1 October 2015.

Additionally from 9 January 2016 all businesses that sold goods or services online had to provide a link on their website to the EU Commission's ODR platform and if the business was committed to using ADR, it had to provide details about its own ODR platform.

However, as a result of the Brexit process the Draft Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 will revoke the operation in the UK of the EU Online Dispute Resolution Regulation.

Putting it all together

Sample question

Could you answer this question? Below is a typical essay question that could arise on this topic. Additionally, a sample problem question and guidance on tackling it can be found on the companion website.

Essay question

'The consumer, unlike some classes with claims on public bounty, is everyone all the time.' (Molony Committee on Consumer Protection, 1961)

In light of statute and case law on consumer protection in commercial transactions, discuss the above statement.

Answer guidelines

Approaching the question

The quotation invites you to examine the definition of consumer within a commercial transaction. Potentially the answer could cover a wide area, so it is best to limit discussion to a few relevant pieces of legislation. This should give the opportunity for more detailed analysis and criticism.

Important points to include

You should consider the following:

- Why there has been a shift towards giving the consumer more protection within a trading relationship.
- How various statutes offered protection by means of *defining* consumer and trader status.
- Draw on the historical definitions in UCTA 1977, s. 12(1); UTCCR 1999, reg. 3(1); SSGCR 2002, reg. 2; as well as the Consumer Rights Act 2015 ss. 2(2) and (3).
- Are the differences in the definitions significant? Consider whether the legislation confers criminal liability, civil remedies or consumer rights, or restricts traders' common law rights.
- To what extent has the European concept of 'consumer' as defined in UCPD 2005/29/EC and CPUTR 2008 affected consumer protection?
- Are there any conflicting decisions in the case law that highlight potential problems in the degree of consumer protection offered?

Impress your examiner

Keep your answer well structured and refer to the quotation. Show that you understand the relevant sections of any legislation used and how they have been interpreted by case law. Use the case law interpretations to address the issue of degree of consumer protection. By covering recent European legislation you will show that you are up to date and innovative in your approach.

Key case summary

Key case	How to use	Related topics
R & B Customs Brokers Co Ltd v *United Dominions Trust Ltd* [1988] 1 All ER 847	To show how a business can assume the role of a consumer under s. 12 UCTA 1977	Sale of goods implied terms; exclusion clauses and UCTA 1977
Stevenson v *Rogers* [1999] 2 WLR 1064	To determine when a party is acting within the course of a business	Sale of goods implied terms; exclusion clauses and unfair contract terms
Davis v *Sumner* [1984] 1 WLR 1301	To show how the criminal law defines a consumer	Unfair trading practices under the CPUTR 2008. Sale of Goods Act 1979, s. 13
Lloyd Schuhfabrik Meyer & Co GmbH v *Klijsen Handel BV (Case C-342/97)* [1999] All ER (EC) 587	To explain the nature of the average consumer's perception limitations of the role of the ECJ	Consumer protection from unfair trading; Unfair Terms in Consumer Contracts Regulations 1999

Key further reading

Key articles/reports	How to use	Related topics
de Lacy, J. (1999) Selling in the Course of a Business under SGA, 62 *Modern Law Review*, Sept.	To trace the development of the concept of selling in the course of a business	Unfair contract terms, Unfair trading practices
Dobson, P. (2004) Exclusion Clause: Dealing as a Consumer, *Student Law Review* 43.	To examine the concept of consumer status	Unfair contract terms
MacDonald, E. (1999) In the Course of a Business – A Fresh Examination, 3 *Web Journal of Current Legal Issues*	To examine the concept of course of a business in both civil and criminal law	Unfair trading practices, sale of goods

Key articles/reports	How to use	Related topics
Twigg-Flesner, C. *et al.* (2005) An Analysis of the Application and Scope of the Unfair Commercial Practices Directive, Report for the DTI, Para. 3.12, p. 41.	To compare the definition of consumer in UCPD with that in the CPUTR 2008	Unfair trading practices

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2

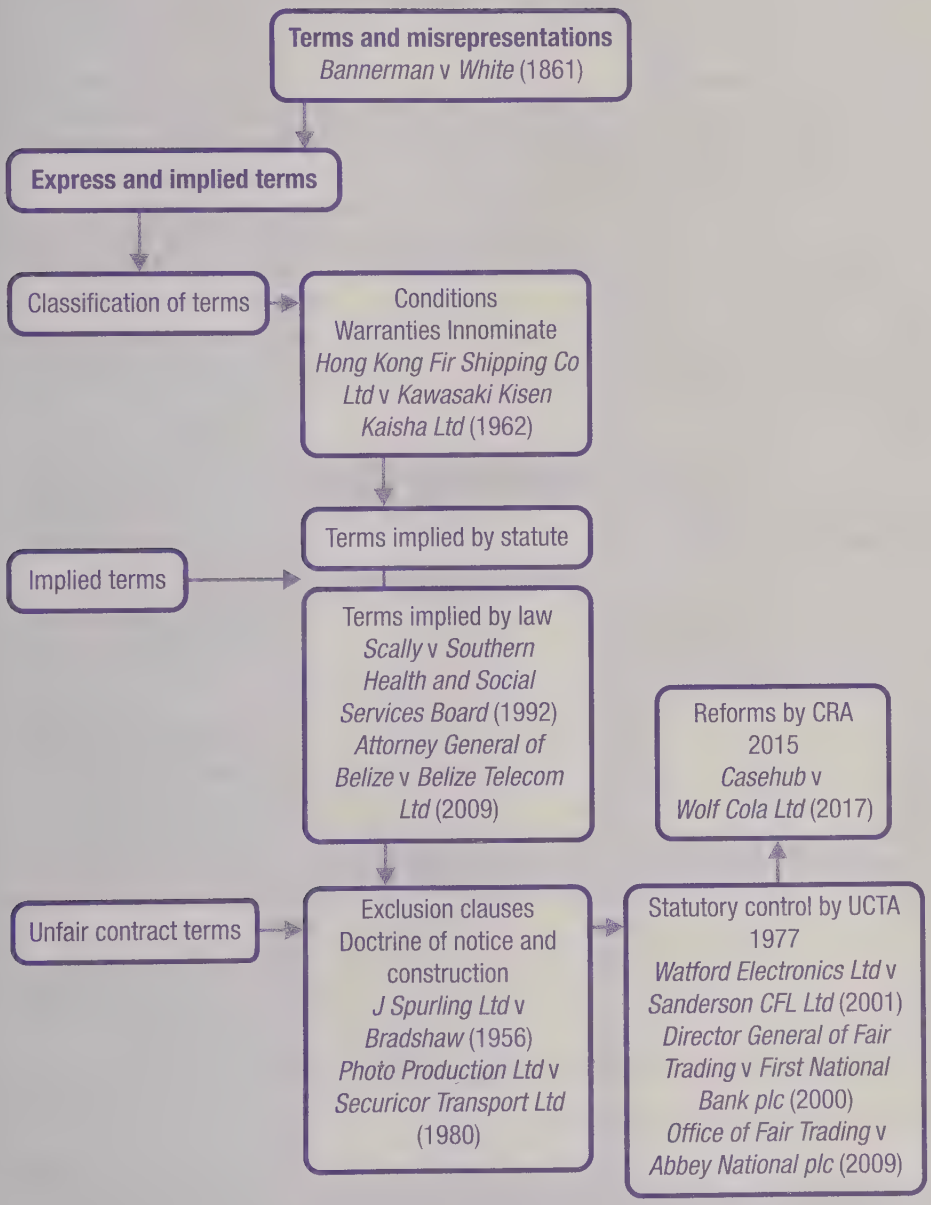
Contract terms

Revision checklist

Essential points you should know:

- How to distinguish between a term and a representation
- The difference between express and implied terms
- Types of terms: conditions, warranties and innominate terms
- Terms implied by statutes and common law
- Unfair contract terms relating to business and consumer transactions

Topic map


Terms and misrepresentations
Bannerman v White (1861)
Express and implied terms
Classification of terms
Conditions
Warranties Innominate
Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (1962)
Terms implied by statute
Implied terms
Terms implied by law
Scally v Southern Health and Social Services Board (1992)
Attorney General of Belize v Belize Telecom Ltd (2009)
Reforms by CRA 2015
Casehub v Wolf Cola Ltd (2017)
Unfair contract terms
Exclusion clauses
Doctrine of notice and construction
J Spurling Ltd v Bradshaw (1956)
Photo Production Ltd v Securicor Transport Ltd (1980)
Statutory control by UCTA 1977
Watford Electronics Ltd v Sanderson CFL Ltd (2001)
Director General of Fair Trading v First National Bank plc (2000)
Office of Fair Trading v Abbey National plc (2009)

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Introduction

Parties to a commercial contract will usually deal on standard form contracts, the terms of which may or may not have been negotiated.

Terms may be **express** (written or stated), or **implied** into an agreement. Sometimes you will find that a business is not always free to impose its own terms into a contract. For instance, terms may be implied into a contract by the court as a practical solution in the interests of business efficacy or fairness. In some cases, a term is implied into a contract by statute, where it may or may not be excluded or overridden by a business's own preferred term. The Unfair Contract Terms Act 1977 (UCTA) and the Consumer Rights Act 2015 (CRA) provide statutory protection for unfair contract terms. This topic lends itself to both essay and problem questions. In either case, you are expected to demonstrate an understanding of the need to balance the conflicting policies of promoting competition, while at the same time protecting the interests of the weaker party.

Assessment advice

Essay questions

Should this topic appear in essay form, you would be expected to provide a critical analysis of the effect of potentially unfair terms in a standard form contract against both a business and a consumer.

Problem questions

A problem question will almost certainly focus on several terms within an agreement that could be a business or consumer transaction. As it is, you could be faced with potentially unfair terms and be expected to analyse their effect from the aspect of business and consumer. It is essential to demonstrate detailed knowledge of relevant sections of the Sale of Goods Act 1979 (SGA), Unfair Contract Terms Act 1977 (UCTA) and the Consumer Rights Act 2015 (CRA). In a commercial context, statutory regulation of potentially unfair terms needs emphasising, although the common law approach should be used to determine their reasonableness or fairness and effectiveness.

Difference between a term and a representation

Any pre-contractual statement made by one party to another may be classified either as a term of the contract or a representation. A distinction should be made between the two because the remedies for breach of contract differ from those for

misrepresentation. Breach of a term entitles the injured party to claim damages for **expectation loss**, whereas an actionable misrepresentation gives rise to a claim for **reliance loss**. The aim of expectation loss is to fulfil a contract by placing a party in the position they would have been in had the contract been carried out. This may include loss of expected profits.

Of course, where expected profits cannot be ascertained or where no profit is expected, a party may wish to claim reliance loss, which aims to restore a party to a pre-contractual position to compensate for out-of-pocket expenses. This distinction becomes significant when examining sale by description in Chapter 3.

Guidelines for determining the status of a pre-contractual statement

The writing test

Any statements written in a document are usually terms.

The skill or knowledge test

Statements made by the party with greater skill or knowledge are more likely to be *terms* whereas those made by the party with lesser skill or knowledge are more likely to be *representations.*

The time test

The greater the interval between making a statement and entering into a contract, the more likely the statement will be a *representation.*

The importance test

A statement that is significant to a party is most often a *term.*

Bannerman v *White* (1861) 10 CBNS 844

Facts

White, who wished to buy hops from Bannerman, asked him whether they had been treated with sulphur, emphasising that if they had, he would not be interested in buying them. Quite innocently, Bannerman said that they had not been treated, so White agreed to buy the hops. It turned out that sulphur had been used on some of the hops, thus White refused to pay. Bannerman sued for the price.

Legal principle

The defendant made it clear that he would not have entered into the contract if the statement had not been made. For this reason, the statement was ▶

considered a term in view of its importance to White. Clearly then, the term had been breached and so White was entitled to withhold payment.

Analysis
Hence it is crucial to stress the importance of a statement made before a contract is entered into in order for it to be deemed a term and part of the agreement. Once a representation has been classified as a term, the claimant may be entitled to claim expectation rather than reliance loss.

The above case is an example of sale by description under the Sale of Goods Act 1979, s. 13.

Sale of Goods Act 1979, s. 13(1)

(1) Where there is a contract for the sale of goods by description, there is an implied (term) that the goods will correspond with the description.

(1A) . . . the term implied by subsection (1) above is a condition.

Sale by description will be examined in greater detail in Chapter 3, alongside other terms implied by the Sale of Goods Act 1979. It is worth noting here that not every statement made during contractual negotiations will constitute a sale by description as defined in s. 13, which specifically refers to the implied term as a condition. For the classification of terms, see below.

Classification of terms

Traditionally *terms* have been categorised as conditions or warranties. When a **condition** is breached, the injured party is given the option of **repudiating** the contract and/or claiming damages. A person repudiates a contract when they show by words or conduct that they no longer see themselves as bound by a contractual obligation. An example is where a person refuses to perform according to the terms of a contract. On the other hand, when a **warranty** is breached an injured party is only entitled to sue for damages.

This classification proved too simplistic, because a term can be breached in many ways with varying degrees of consequence. Given this, in certain situations a term can be classified as an *innominate* term. The following case illustrates how a term classified as a condition can have variable effects when breached and, as a result, can become innominate.

***Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA)**

Facts

A ship was chartered for two years by Kawasaki (the charterers) but was out of service for 20 weeks as it was declared 'unseaworthy'. The charterers mitigated their loss by commissioning a cheaper charter elsewhere. When the ship was declared seaworthy, the charterers repudiated the contract. The owners then sued for wrongful repudiation.

Legal principle

The charterers were in breach. 'Seaworthiness' was not in this case a condition, but an innominate term. It was neither a condition nor a warranty but the consequences of the breach were not serious enough to justify repudiation.

Analysis

Because innominate terms can be broken in a variety of ways, the seriousness of the consequences of a breach becomes crucial in determining the status of the term. For example a ship could be deemed unseaworthy for not having the required number of anchors, the consequences of which would not be as serious as a hole in the hull.

Don't be tempted to . . .

It is not enough to state that a term is a condition, as the court may decide otherwise. A term will be seen as a condition in the following situations: where parties give themselves the right to terminate; where statute expressly labels a term as a condition (Sale of Goods Act 1979); or where the term identified as a condition can only be broken in one way.

Express and implied terms

Express terms are terms that are written or spoken whereas implied terms are terms that are not written or spoken, but implied in a variety of ways.

Terms implied by statute

Certain statutes imply terms, usually as conditions, into contracts. The Sale of Goods Act 1979 (see Chapter 3) implies the following terms into contracts for sale of goods:

- The right to sell: s. 12.
- Goods correspond with description: s. 13.

- Goods are of satisfactory quality and fit for purpose: s. 14.
- Where there is sale by sample, the bulk of the goods match the sample: s. 15.

The implied terms listed above are classified as conditions (s. 12(1) and ss. 13–15) or warranties (s. 12(2)). However, s. 15A allows a court to refuse to permit a buyer to terminate a contract for breach of a condition where the seller's breach is so trivial as to not warrant termination.

Note: Any buyer (business or consumer) who has *accepted* the goods under s. 35 also loses the right to repudiate (see Chapter 5).

So far you have been given a brief introduction to the implied terms imposed by the Sale of Goods Act 1979 for the purposes of classification and rights of repudiation. It is important to be aware of ss. 12–15 when looking at the effects of the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015 later on in this chapter. For further details on the sections mentioned above, you should refer to Chapter 3.

Terms implied by the courts at common law

Where terms are not expressed, they may instead be implied by custom as a matter of fact or in law. Terms are implied by custom usually to preserve recognised business practice. Should there be no customary business practice, terms may be implied by fact in cases where it is obvious that the parties intended such terms to be included and, as a consequence, were prepared to act upon them in *good faith.* Meanwhile, terms are implied by law in relationships of common occurrence, such as landlord and tenant. These terms do not necessarily reflect any intentions of the parties involved, but are seen as favourable duties for promoting their beneficial good.

Don't be tempted to . . .

Take care not to overlook the debate on terms implied by law. There are one or two issues that pose questions. First, the debate between Lord Wilberforce and Lord Cross in *Liverpool City Council* v *Irwin* [1977] AC 239. While Lord Wilberforce stated that the implication of terms by law was by necessity, Lord Cross replied that the test should be one of 'reasonableness'. Lord Bridge in *Scally* v *Southern Health and Social Services Board* [1992] 1 AC 294 combined the two tests, stating that the implication of some terms into contracts was both *necessary* and *reasonable.* Second, there is a concern over the question of whether terms are implied or imposed by law. Unless they are excluded or modified expressly in a contract, some terms may well be imposed as obligations upon the agreement of parties.

Scally v *Southern Health and Social Services Board* [1992] 1 AC 294

Facts
The claimant, who was employed by the defendant health authority, was not informed of his right to claim extra years on his pension scheme at certain favourable rates. As a result, he missed the deadline for exercising this right.

Legal principle
The duty to inform employees of such rights should be an implied term of an employment contract as it is a reasonable and necessary informative measure: '. . . it is not merely reasonable but necessary, in the circumstances. . . ' (*per* Lord Bridge).

Analysis
This is an example of an obligatory term imposed upon an employer.

Impress your examiner

It would be useful to draw the examiner's attention to Lord Hoffmann's recent consideration of implied terms in *Attorney General of Belize* v *Belize Telecom Ltd* [2009] UKPC 10 (supported by the Court of Appeal in *Mediterranean Salvage & Towage Ltd* v *Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531). In the *Belize Telecom* case Lord Hoffmann stated that terms should not be introduced just to make a contract more fair or reasonable. What matters is what the agreement means to a reasonable person in possession of all background knowledge (reasonably) available.

Attorney General of Belize v *Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988

Facts
The Belize government privatised its telecommunications service in 1989, transferring it to Belize Telecommunications Ltd. Under the company's rules there were three types of shares: Class B, Class C and a special share. Class B shareholders and the special shareholder could each appoint or remove two directors and the Class C shareholders could appoint or remove four of the directors. Additionally, the rules stated that, should *a special shareholder* own ▶

as much as 37.5 per cent of the C shares, he could appoint or remove two out of the four C directors who made up 50 per cent of the Board, as well. The first respondent, Belize Telecom Ltd (BT) purchased the special share and 37.5 per cent of the C shares from the government and then appointed two of the four C directors. Yet, to finance purchase of the C shares BT took a loan from the government, who retained a right to recover the shares in the event of a default. As it transpired, BT defaulted on the loan and so the government exercised its right to recover a substantial number of the C shares, but which did not include the special share. Subsequently, the government applied to remove the two directors that were appointed on behalf of the person who held the 'special share'. The Attorney General argued that, as the shareholding used to vote in the two directors (within the four) had now ceased to exist the directors should leave. The company's objection was that only a person holding both 37.5 per cent of C shares and a special share could dismiss the two directors. The question put before the Privy Council was: did a shareholder with 37.5 per cent holding of C shares have to own the special share, in order to remove the directors?

Legal principle

Lord Hoffmann's argument was that the directors could be dismissed; otherwise it would be absurd to allow just one nominee who had a special share status to block their dismissal, as the government was now in possession of 37.5 per cent of the C shares. The overriding purpose of the appointment and removal of directors in this case was to ensure that the board reflected the shareholders' interest. There was an implied term that a director would vacate office when there was no shareholding to authorise their appointment.

Analysis

This decision reflects the court's reluctance to allow directors to remain in post by operation of a technicality over and above the shareholders' interest.

Unfair contract terms

Terms have the potential for being unfair, especially when imposed by the party with the stronger bargaining power. As well as being subject to common law controls, unfair contract terms are also regulated by legislation. The Unfair Contract Terms Act 1977 is concerned with **exclusion clauses** operating within business transactions, while the Consumer Rights Act 2015 applies to unfair terms in contracts made between a consumer and a trader. An exclusion clause is a term or notice that attempts to exclude or restrict liability for one's acts or omissions.

Exclusion clauses

The common law approach to the control of such clauses depends on the following:

- The doctrine of notice.
- Construction of the clause.

The doctrine of notice (incorporation)

This is a principle based on the assumption that a party is not bound by a term they are not aware of. To decide IF a party is aware of a term, the court will assume that a party:

- who signs a document will generally be bound by it.
- who lies about the effect of a clause may not be able to rely on it.
- will be deemed to have notice of a clause if it is within a document that a 'reasonable person' would expect to contain such a clause.
- may be bound by a clause if there is a course of dealing with the other party, or if the clause is *standard trade practice.* And that:
- any clause that is unusual or onerous is subject to the 'red hand rule'.

The red hand rule

When an onerous or unusual clause is seen to be unreasonable, it has to be highlighted, so as to alert anyone who may become subject to it.

***Interfoto Picture Library* v *Stiletto Visual Programs* [1988] 1 All ER 348 (CA)**

Facts
The defendants borrowed some photographs from a picture library. The delivery note stated that a fine of £5 per day, plus VAT, was payable for each photograph not returned by the deadline. It turned out that the defendants returned the photographs 13 days after the deadline, and thus received a fine of £3,783.50.

Legal principle
The court held that this term was extortionate and consequently reduced the amount to £3.50 per photograph, per week.

Analysis
It is incumbent on a person seeking to enforce onerous or unusual terms to take reasonable steps to draw the other party's attention to it.

The following case gives a useful quotation from Lord Denning.

J Spurling Ltd v *Bradshaw* [1956] 1 WLR 461

Facts
The defendant, who regularly dealt with the plaintiff, delivered eight barrels of orange juice to the plaintiff for storage in his warehouse but was not given a delivery note until a few days after delivery. There was a reference on the front of the receipt to conditions on the back, one of which was an exclusion clause for loss or damage caused by negligence of the plaintiffs or their employees. When the defendant collected the barrels, they were empty, and he refused to pay the storage charge, whereupon he was sued by the plaintiff. The defendant counter-claimed negligence on the part of the plaintiff, who in turn pleaded the exclusion clause.

Legal principle
Although the clause was quite onerous and as such should have been clearly shown to the defendant at the time of the contract, the defendant's claim that he did not receive notice of the exclusion until after the contract had been entered into was rejected as he admitted that he had received such notes in past dealings with the plaintiff.

Analysis
What constitutes a suitable course of dealing will depend on the circumstances of the contract and past relationship of the parties.

This case is noted for the following *dictum*: 'Some clauses which I have seen would need to be printed in red ink . . . with a red hand pointing to it' (*per* Lord Denning).

Construction of the clause

Any clause that is ambiguous will be construed against the party relying on it – ***contra proferentem*** – to encourage clarity of expression. A court will use the *contra proferentem* approach to interpretation of a clause where the clause appears ambiguous or contradictory. Against this, liability for a fundamental breach of contract can be excluded, as long as the clause clearly covers the breach.

Photo Production Ltd v *Securicor Transport Ltd* [1980] AC 827

Facts
The plaintiffs contracted Securicor to provide security personnel for their factory. Securicor excluded liability for unforeseen loss from burglary, theft or fire, caused other than by negligence of their own employees. It transpired that a security

guard did cause a fire, by deliberately throwing away a lit match. In the event, the factory was destroyed, which resulted in a loss of £615,000, and yet the clause was held to be effective.

Legal principle
The parties were viewed by Lord Diplock as being on equal bargaining terms and free to apportion risk. Despite the fact that the damage was caused deliberately, the defendants had indeed excluded this very liability and were absolved from responsibility.

Analysis
Lord Diplock noted 'the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses'. This decision appears to be based on the doctrine of freedom of contract, where parties are free to include such terms as long as they are clearly constructed.

Statutory controls of exclusion clauses and unfair contract terms

Exclusion clauses in business transactions are controlled by the Unfair Contract Terms Act 1977, whereas unfair contract terms in consumer transactions are regulated by the Consumer Rights Act 2015.

Unfair Contract Terms Act 1977 (UCTA)

The Unfair Contract Terms Act 1977 restricts exclusions of liability for breach of contract and negligence by either declaring such clauses **void** or subject to a test of reasonableness. The Act applies to **business liability** in business transactions, but not private transactions.

Until the Consumer Rights Act 2015 came into force UCTA 1977 applied to consumer transactions as well as business transactions. This is no longer the case and therefore any sections referring to consumer transactions have now been repealed.

Table 2.1 outlines key provisions of UCTA 1977 with a brief explanation for each key section.

Table 2.1 UCTA 1977 provisions

Unfair Contract Terms Act 1977 section number	Explanation of section
Section 2(1): Negligence liability for death/personal injury	States that no one can exclude or restrict liability for death or personal injury arising out of negligence

Unfair Contract Terms Act 1977 section number	Explanation of section
Section 2(2): Negligence liability for other loss	States that liability for other loss/damage arising out of negligence can be excluded if reasonable according to the guidelines given in s. 11
Section 3: Liability in cases of breach of contract	This section applies where a party to a contract deals on the other party's written standard terms that exclude or restrict liability for breach of contract and makes such terms wholly subject to the test of reasonableness

Sometimes a party dealing as a business may wish to exclude or limit liability relating to ss. 12, 13, 14 and 15 of the Sale of Goods Act 1979. Table 2.2 states that liability for s. 12 of SGA 1979 can never be excluded or limited, whereas liability under ss. 13, 14 and 15 may be excluded or limited if reasonable.

Table 2.2 Excluding or limiting liability under SGA 1979

Unfair Contract Terms Act 1977 section number	Explanation of section
Section 6: Sale and hire purchase	(1) (a) Liability arising from s. 12 (*title*) of Sale of Goods Act 1979 and (b) s. 8 of the Supply of Goods (Implied Terms) Act 1973 cannot be excluded or limited
	(1A) (a) Liability arising from breach of . . . s. 13, 14 or 15 of the 1979 Act and (b) s. 9, 10, or 11 of the 1973 Act can be excluded or restricted if reasonable.

Section 7 of the Act provides for other contracts under which goods pass from one to another, such as when goods are supplied with a service. In such cases liability *can* be excluded or limited, subject to the test of reasonableness.

Don't be tempted to . . .

Do not ignore the 'test of reasonableness' when attempting examination questions. Section 11 provides only guidelines, as opposed to rules, for assessing whether or not a term is reasonable. It is important to appreciate that whether a term is fair and reasonable will depend on the circumstances which the parties ought (reasonably) to have known or thought about when the contract was made. Other guidelines in s. 11 include factors such as the availability of insurance when limiting, rather than excluding, liability. The case law shows that assessment of reasonableness can be unpredictable. Further complications result from the need to refer to Sch. 2 for exclusions concerning sale of goods.

You may find it useful to refer to ss. 12, 13, 14 and 15 SGA 1979. For descriptions of these sections, as well as ss. 9, 10, 11, 13 and 17 of the Consumer Rights Act 2015, see Chapter 3. You will see how CRA 2015 effectively gives much greater protection to consumers than to businesses, not just against exclusions of the implied terms granted under legislation for the sale, but also for the supply and hire of goods. Businesses often buy in bulk using generous discounts and, therefore, are not entitled to expect their purchases to be of the highest quality. Once more, this is reflected in the 'reasonableness guidelines' given in Sched. 2 to UCTA 1977.

Unfair Contract Terms Act 1977, Sched. 2

Schedule 2 provides guidelines for assessment of reasonableness of exclusions in contracts for the sale, supply and hire of goods, by recommending that the following factors be taken into account:

(a) Strength of bargaining positions that allow for alternative choices available to the customer.

(b) Any inducements or discounts offered to the customer – bearing in mind a choice of purchase elsewhere – without the exclusion.

(c) Whether the customer ought to have known of the term, in the light of any trade, custom, or course of dealing.

(d) Does the exclusion come into effect when a condition is not complied with?

(e) Were the goods manufactured, processed, or adapted to a special order for the customer?

The following case is a good example of application of the test of reasonableness.

Watford Electronics Ltd v *Sanderson CFL Ltd* [2001] EWCA Civ 317

Facts

A term in a contract for the supply of customised software excluded liability for indirect or consequential loss and limited liability for direct loss, to the price paid (£104,600). Actually, the software system was faulty and caused a £5.5m loss. At first, the exclusions were found to be unreasonable. But on appeal it was held that the clauses were, in fact, reasonable.

Legal principle

With regard to the exclusion of liability for indirect loss, it was agreed that there was equal bargaining power. Both parties were well aware of the term and its effects, and so the loss could have been covered by insurance. It was accepted that as a bespoke product, this was the only choice available. On balance, the clause was commercially reasonable as it 'limited liability' to the price of the product.

Analysis

Lord Justice Chadwick felt that the courts should not interfere in commercial deals where parties are on equal bargaining terms and where it is obvious that no party has taken unfair advantage of the other.

Unfair contract terms and consumers

The law on unfair terms in consumer contracts has been the subject of much reform since 1994. The Consumer Rights Act 2015 has implemented the Consumer Rights Directive (2011/83/EU) to consolidate and codify the law relating to consumer protection, most notably the law on unfair contract terms. The relevant provisions for consumers within the Unfair Contract Terms Act 1977 were removed and the Unfair Terms in Consumer Contracts Regulations 1999 were repealed and have been replaced by the Consumer Rights Act 2015 since 1 October 2015. However, some knowledge of the law before 1 October 2015 is necessary to aid your understanding of the need for reform.

Unfair Terms in Consumer Contracts Regulations 1999

Don't be tempted to . . .

It is easy to confuse the 1994 with the 1999 Regulations. The European Directive 93/13/EEC on unfair terms in consumer contracts was implemented originally by means of the Unfair Terms in Consumer Contracts Regulations 1994. Some cases refer to the 1994 Regulations because these apply to contracts made between 1 July 1995 and 1 October 1999. On 1 October 1999, the Unfair Terms in Consumer Contracts Regulations came into force and in so doing, repealed the 1994 Regulations. Likewise on 1 October 2015 the Consumer Rights Act came into force thereby repealing the Unfair Terms in Consumer Contracts Regulations 1999.

The aim of the Directive was **harmonisation** of the laws on unfair terms in consumer transactions, to facilitate trade between EC Member States.

Impress your examiner

Rather than create a single piece of legislation to regulate unfair terms, the UK government decided to implement the Directive separately so that there were two pieces of overlapping legislation – UCTA 1977 and UTCCR 1999. Because this led to complexity and some confusion, the Law Commission eventually produced a draft Bill to unify the legislation on unfair contract terms (see Law Com. No. 292 (2005) Unfair Terms in Contracts). The Consumer Rights Bill was introduced into the UK Parliament in 2013.

Scope of the Regulations

The Regulations applied to unfair terms in standard form contracts as follows:

- Where one party dealt as a business and the other as a consumer.
- Any disputed term had to be one which had *not* been individually negotiated.
- If some terms *had* been individually negotiated, the contract could still be considered to be unfair if the rest of the terms were in standard form.
- Any terms that were incorporated in accordance with UK statutory or Community requirements were *not* subject to the Regulations.
- Terms that are **core terms**, which are terms that either define the subject matter of a contract, or are concerned with the adequacy of the contract price, but which were *not* subject to the Regulations.

With regard to the terms themselves: they had to be in plain, intelligible language and if there was any doubt about interpretation of a term, then the court would interpret the term in favour of the consumer – *contra proferentem.*

Terms which had the potential to be deemed unfair

An unfair term is any term that is contrary to the *good faith* shown towards it, and thereby causes a significant imbalance against the consumer interest.

Director General of Fair Trading v *First National Bank plc* [2000] All ER 759

Facts

The First National Bank made consumer credit agreements on their standard form contracts. One of their terms (a 'default clause') stated that, should the bank obtain judgment against a debtor for default, then interest should continue to be paid at the *contract rate* until the debt was cleared. In the Court of Appeal, it was held that this term was not a 'core term' and that it was unfair according to the Regulations. However, the bank appealed to the Lords on the basis that it did not contravene the requirement of good faith, nor cause a significant imbalance to the detriment of the consumer.

Legal principle

Having accepted that the Regulations applied to the term, the Lords decided that the term was not unfair, since it did not cause a significant imbalance. The consumer had contracted to pay interest on the debt anyway, and should continue to do so until it was repaid.

Analysis

The court decided that the default clause could not represent a core term because terms in contracts such as this had to be interpreted restrictively; otherwise a wide variety of terms could be seen as core. This could mean that the majority of terms in financial services contracts would be exempt from the Regulations and consumers would receive no protection. It is interesting to note that the Consumer Rights Act 2015 has attempted to place certain restrictions on core terms, stating that they will be seen as core only if they are transparent and prominent – see CRA 2015 s. 64(3) and (4).

It is interesting to compare the decision in *DGFT* v *First National Bank plc* (2000) with that made by the Supreme Court in the following case.

Office of Fair Trading v *Abbey National plc* [2009] UKSC 6

Facts

In this appeal the Supreme Court was asked to decide whether the OFT could institute an investigation into whether bank charges for unauthorised overdrafts were fair. In deciding this issue the Supreme Court had to decide whether or not the charges were classed as core terms. If they were core terms, then they were excluded from the provisions of UTCCR 1999 so the test of fairness could not be applied.

Legal principle

The charges for unauthorised overdrafts were part of the core terms of the agreement between the banks and their customers because they related to '. . . the adequacy of the price or remuneration as against the goods or services supplied in exchange'. The charges were deemed to be part of the price paid by the customer for the banking services provided. As such, they were not subject to the test of fairness because the UTCCR 1999 did not apply.

Analysis

It may well be that if the charges had been found not to be a core term, and the test of fairness applied, then the court would be faced with the dilemma of having to decide whether it would be fair to pass the costs of compensating those who had been charged for unauthorised overdrafts on to those customers who kept within the limits set by their authorised overdrafts.

Although the decisions in both of the above cases favoured the banks, it is difficult to distinguish *OFT* v *Abbey National plc* (2009) from *DGFT* v *First National Bank plc* (2000) in terms of how a core term was defined. Perhaps a distinction can be made on the grounds that a default clause operates only when a bank has obtained judgment against a debtor, whereas the unauthorised overdraft charges could be seen as an extra charge imposed by the banks at their own discretion. Besides, the justification given for defining a core term in the *Abbey National* case appears more substantial than that given by the Lords in the *First National Bank* case, although it does widen the category of terms that may qualify as 'core'.

Schedule 2 UTCCR 1999 gave a non-exhaustive list of potentially unfair terms. These have been preserved and added to by the Consumer Rights Act 2015.

Unfair Terms in Consumer Contracts Regulations 1999, Sched. 2

Here are a few examples of potentially unfair terms under these Regulations:

Where the seller/supplier, but not the consumer, can terminate the contract with or without reasonable notice; or, give himself, but not the consumer, the right to compensation for cancellation. ▶

Where the seller reserves the right to cancel a contract and retains the deposit, or raises the price without giving the consumer any rights to cancel.

Where a seller varies a term for no good reason or for a reason outside the contract.

Where the seller gives himself sole rights to interpret the terms of the contract, or ascertain whether the 'goods' conform to the contract.

Reforms introduced by the Consumer Rights Act 2015

Part 2 and Schedule 2 to the CRA 2015 re-implemented the Unfair Contract Terms Directive 93/13/EEC into UK law. Unlike the UTCCR 1999, the test of fairness can be applied to notices (s. 62) as well as consumer contracts.

The test of fairness outlined in s. 62(4) is the same as that given in the UTCCR 1999 and core terms remain exempt from the provisions of the Act but only insofar as they are transparent *and* prominent (s. 64(3) and (4) CRA 2015). *Transparent* means that a term must be in plain and intelligible language, and if written, it must be legible, whereas *prominent* means that a term must be brought to a consumer's attention in a manner that would make an average consumer aware of it.

Casehub Ltd v *Wolf Cola Ltd* [2017] EWHC 1169 (Ch)

Facts

Casehub is a company that acts for consumers on a class action basis for a commission. The defendant company provided iCloud storage for £20 a month for a fixed term of 12 months to both businesses and consumers, subject to a cancellation fee calculated as a lump sum to cover any outstanding months left in a contract – less 10 per cent for early payment. Owing to problems with Wolf's system, many customers who signed up in August 2016 did not receive their log-in details. Those who terminated the agreement within the first month of the contract were charged a cancellation fee of £196. One of the questions considered by the court was whether the cancellation fee in the terms and conditions was excluded from the Test of Fairness under Part 2 of CRA 2015.

Legal principle
The cancellation fee was deemed to be a core term as it formed part of the price and so was not subject to the Test of Fairness under s. 64(1)(b) of CRA 2015.

Analysis
In this decision the court was bound by the Supreme Court's decision in *OFT v Abbey National plc* [2009] UKSC 6 and in particular Lord Mance's dicta: 'If on a proper analysis the customer's potential for the relevant charge is the price or part of the price or remuneration in exchange for which the overall package of banking services is supplied and is challenged on the ground that it makes such a price or remuneration disproportionate overall, then reg. 6(2)(b) (of UTCCR 1999) excludes the challenge.' It is interesting to note that under the criteria of the 'grey list' under s. 63 Sched. 2 of CRA 2015 (see below) it could have been possible to argue that the price was disproportionately high for a service that would not be provided. However, this case illustrates the emphasis placed on core term exemptions – as long as the term is both transparent and prominent.

Impress your examiner

When discussing core terms it would be interesting to question whether core terms should always be exempt from the test of fairness. For example the Law Society (2012) in their response to the Law Commission's (2012) Unfair terms in consumer contracts: a new approach? Issues paper suggested that terms such as early cancellation charges should be inserted into the grey list and not be exempt from the test of fairness. Accordingly s. 63 states that terms on the grey list are assessable for fairness even if they would otherwise qualify for an exemption under s. 64 and terms on the grey list are assessable even if they are transparent and prominent. (See the Consumer Rights Act 2015 Part 2: Unfair Terms – Explanatory Notes.)

As a further measure, in contrast to the UTCCR 1999, the CRA 2015 provides that a term that has been individually negotiated by a consumer can be seen to be unfair, presumably because of the possible relationship between the trader and consumer of inequality in terms of bargaining power. See Table 2.3.

The 'grey list' of terms that may or must be regarded as unfair

Section 63 introduces Sched. 2 which gives examples of terms that may or must be regarded as unfair and are substantially similar to those listed in Sched. 2 to UTCCR 1999; it also adds the following examples of terms: those which allow:

- the trader to decide the characteristics of the subject matter after the consumer is bound.
- disproportionate charges or require the consumer to pay for services that have not been supplied when the consumer ends the contract.
- the trader discretion over the price once the consumer is bound.

Regulation of the use of unfair contract terms

The Competition and Markets Authority (CMA) and other regulators coordinated by the CMA can investigate and apply for injunctions to prevent the use of terms deemed unfair, not transparent or void (s. 70 Sched. 3). As a preventative measure the CMA can issue guidance and publish information about actions taken against certain terms and notices. Similar enforcement powers are granted to other public bodies through Part 8 of the Enterprise Act 2002.

Table 2.3 General comparison between the Unfair Contract Terms Act and the Consumer Rights Act 2015

Unfair Contract Terms Act 1977	Consumer Rights Act 2015
Exclusion and limiting clauses only	All kinds of terms
Excludes insurance contracts; contracts for interests in land and auction sales	Excludes employment contracts; 'core terms' which are transparent and prominent; and terms required by statute
Makes some exclusion clauses null and void and others subject to the 'test of reasonableness'	Some clauses are prohibited and others are subject to the test of fairness on the basis of good faith and concepts dealing with significant imbalance
Protects business-to-business dealings in contractual and non-contractual situations	Applies only to consumers who deal with a business/trade/professional supplier

Good faith and contract terms

Impress your examiner

When discussing unfair contract terms, the issue of whether or not the parties should be expected to act in *good faith* needs to be addressed. The more so as Lord Bingham indicated in *Interfoto Picture Library* v *Stiletto Visual Programmes Ltd* [1989]1QB 433 unlike most other legal systems, English Law gives no principled commitment to the concept of good faith in commercial transactions. Recently though, Leggatt LJ actually attempted to scrutinise the intentionality of good faith dealings in *Yam Seng Pte Ltd* v *International Trade Corporation Ltd* [2013] EWHC 111(QB). He was of the view that English Law should indeed recognise more widely the performance of good faith – as long as it could be semantically interpreted within the context of a contract, rather than based on some ill-defined edict.

Yam Seng Ltd v *International Trade Corp* [2013] EWHC 111 QB

Facts

On 12 May 2009, ITC granted YS exclusive rights to distribute Manchester United toiletries to duty free shops in the Middle East, Asia, Africa, Malaysia and Australia – as well as to domestic retailers in Hong Kong, Macau, and two Chinese provinces. However, in July 2010, YS repudiated the contract on the grounds that ITC was in breach for late delivery, failure to supply, undercutting prices and misrepresentation.

Legal principle

ITC was in fact found to be in breach of contract for late delivery of orders, a failure to supply, and for acting in bad faith by reassuring YS that an agreed domestic retail price among retailers in Singapore would not undercut the duty free price originally set with YS. Also, ITC were liable under s. 2(1) of the Misrepresentation Act 1967 for falsely stating to YS that they had been granted a licence to distribute products to the two China provinces, when they had not.

Analysis

Leggatt J appears to have extended the concept of good faith in fiduciary contracts to contracts of a relational nature. Such contracts are long term and include contracts of joint venture, franchise agreements, long-term distributional agreements and those involving a high degree of communication and expected performance based on mutual trust and confidence.

Putting it all together

Sample question

Could you answer this question? Below is a typical problem question that could arise on this topic. Additionally, a sample essay question and guidance on tackling it can be found on the companion website.

Problem question

Mr Plant bought a shrub recommended by the Everlasting Garden Centre (EGC), as he needed a quick-growing, ground-covering shrub for the botanical garden where he worked. He used his trade discount card to pay for the plants. Those he had left over he planted in his own garden back home. Unfortunately, the shrub turned out to be an invasive and vigorous variety of Japanese giant hogweed and spread so rampantly that it killed off other plants and even lifted up pathways, resulting in £5,000 worth of damage to the botanical garden and £1,500 to his garden. When Mr Plant complained to EGC, his attention was drawn to the following clauses on the invoice:

(1) EGC agrees to refund the purchase price of any products that fail to meet satisfactory standards of quality.

(2) Subject to clause 1 above, EGC undertakes no liability for damage, howsoever caused, by any product that fails to meet satisfactory standards of quality.

Advise Mr Plant on the effectiveness of the above clauses.

Answer guidelines

Approaching the question

It is important to note that the question only requires you to address the issue of the exclusion clauses, so at this stage do not give detailed analysis of the implied terms. Mr Plant has entered into a contract with the Everlasting Garden Centre. The Everlasting Garden Centre could be in breach of contract yet may be protected by the clauses. Identify the breach of contract first and then address the issue of the clauses. Examine the scenario to see how the common law rules of notice and interpretation of terms apply before turning to the relevant sections of the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015 should Mr Plant be deemed to have consumer status. Finally, deal with the assessment of damages.

Important points to include

- In identifying breach of contract, you should identify that the exclusion clauses are attempting to exclude implied terms of satisfactory quality, and fitness for purpose under the SGA 1979 and CRA 2015.

- Having identified the relevant sections of the SGA 1979 and CRA 2015, you should then go on to the issue of exclusion and limitation of liability and explain the common law doctrine of notice particularly regarding signed documents and 'the small print'. Cases illustrating the effect of the *contra proferentem* rule may be applied to clause 2.
- You first need to apply the definition of 'consumer' in the CRA 2015 to see if Plant is acting as a consumer. You should also refer to the previous case law on consumer/business status.
- Then you need to explain and apply the CRA 2015 (s. 62(4)) to see if the terms are unfair.
- In the event of Plant dealing as a business, s. 6(1)(1A) UCTA 1977 will need to be explained as well as the test of reasonableness as defined in s. 11 and Sched. 2.
- Case law should be applied to determine reasonableness since clause 1 is a limiting clause.

Impress your examiner

Structure your answer so that each point is dealt with in a logical sequence. Make sure you apply s. 14(2) and (3) SGA 1979 to the facts of the question. Address the issue of how the nature of the transaction affects the degree of protection offered by relevant legislation regulating unfair terms and how on occasion businesses have tried to assume consumer status in their dealings to take advantage of consumer protection. It is worth indicating that courts may show a more favourable attitude to limiting clauses imposed against business customers.

Key case summary

Key case	How to use	Related topics
Bannerman v *White* (1861) 10 CBNS 844	To distinguish a representation from a term	Sections 13 and 14 SGA 1979
Hong Kong Fir Shipping Co Ltd v *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA)	To illustrate the operation of an innominate term	Contract terms, nature of a term, remedies for breach of contract of sale and rights to repudiate ▶

Key case	How to use	Related topics
Scally v *Southern Health and Social Services Board* [1992] 1 AC 294	To explain how courts imply terms into contracts	Breach of contract
Attorney General of Belize v *Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988	To explain the test used to determine implied terms	Agency law: authority by conduct
Interfoto Picture Library v *Stiletto Visual Programs* [1988] 1 All ER 348 (CA)	To point out the significance of giving notice of onerous terms	Consumer Rights Act 2015
J Spurling Ltd v *Bradshaw* [1956] 1 WLR 461	To explain the court's attitude to notice of onerous clauses by way of the *Red Hand Rule*	*Contra proferentem* interpretation of contract terms. Absence of good faith in contractual relationships
Photo Production Ltd v *Securicor Transport Ltd* [1980] AC 827	To demonstrate when liability can be excluded for fundamental breach of contract	Supply of Goods and Services Act 1982, ss. 13 and 16
Watford Electronics Ltd v *Sanderson CFL Ltd* [2001] EWCA Civ 317	To show how the test of reasonableness operates in cases of equal bargaining power	Contractual terms in contracts for the sale and supply of goods
Director General of Fair Trading v *First National Bank plc* [2000] All ER 759	To outline the definition of a *core term* and *fairness*	Unfair terms in consumer contracts. Credit agreements – unfair relationships
Office of Fair Trading v *Abbey National plc* [2009] UKSC 6	To clarify definition of a *core* term and explain the circumstances in which the *test of fairness* applies	Unfair contract terms in consumer contracts; unfair relationships in credit agreements
Casehub Ltd v *Wolf Cola Ltd* [2017] EWHC 1169 (Ch)	To clarify the definition of a core term and explain the circumstances in which the test of fairness applies	Unfair terms in consumer contracts

Key case	How to use	Related topics
Yam Seng Pte Ltd v *International Trade Corporation Ltd* [2013] EWHC 111(QB)	To consider what role good faith plays in contractual relationships	Implied terms, misrepresentation, unfair contract terms

Key further reading

Key articles/reports	How to use	Related topics
Bradgate, R. (1997) Unreasonable Standard Terms, 60 *Modern Law Review* 582.	Illustrates the use of the test of reasonableness	Sale of goods, credit agreements
Consumer Rights Act 2015 – Parliament researchbriefings. files.parliament.uk/documents/SN06588/SN06588.pdf	As a guide to unfair terms in the CRA 2015	Sale of goods, supply of services and digital content
Giliker, P. (2017) The Consumer Rights Act 2015 – a bastion of European consumer rights? *Legal Studies* 37(1), pp. 78–102.	As an analysis of the CRA 2015	Sale of goods, supply of services, and digital content
Law Commission (2005) Unfair Terms in Contracts, No. 292 Cmnd 6464.	To gain information on the background to CRA 2015	Exclusion clauses
Law Commission (2012) Unfair terms on consumer contracts: a new approach? Issues paper, Stationery Office: London.	To focus on the issue of core term exemptions	Standard term contracts
Law Society (2012) Unfair terms in consumer contracts: a new approach? Response by the Law Society, October 2012.	To examine the requirements for cancellation rights	Consumer credit

Key articles/reports	How to use	Related topics
MacDonald, E. (2004) Unifying Unfair Terms Legislation, 67 *Modern Law Review* 763.	As a background to reform	Exclusion clauses and unfair terms
Overy, E. (2015) The Consumer Rights Act 2015: Clarity & Confidence for Consumers and Traders, 8 *JIBFL* 504.	As a guide to unfair terms in CRA 2015	Sale of goods, supply of services and digital content
Unfair Contract Terms Guidance: Guidance on the Unfair Terms Provisions in the Consumer Rights Act, *CMA* 37, 31 July 2015.	As a guide to unfair contract terms in CRA 2015	Exclusion clauses

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3

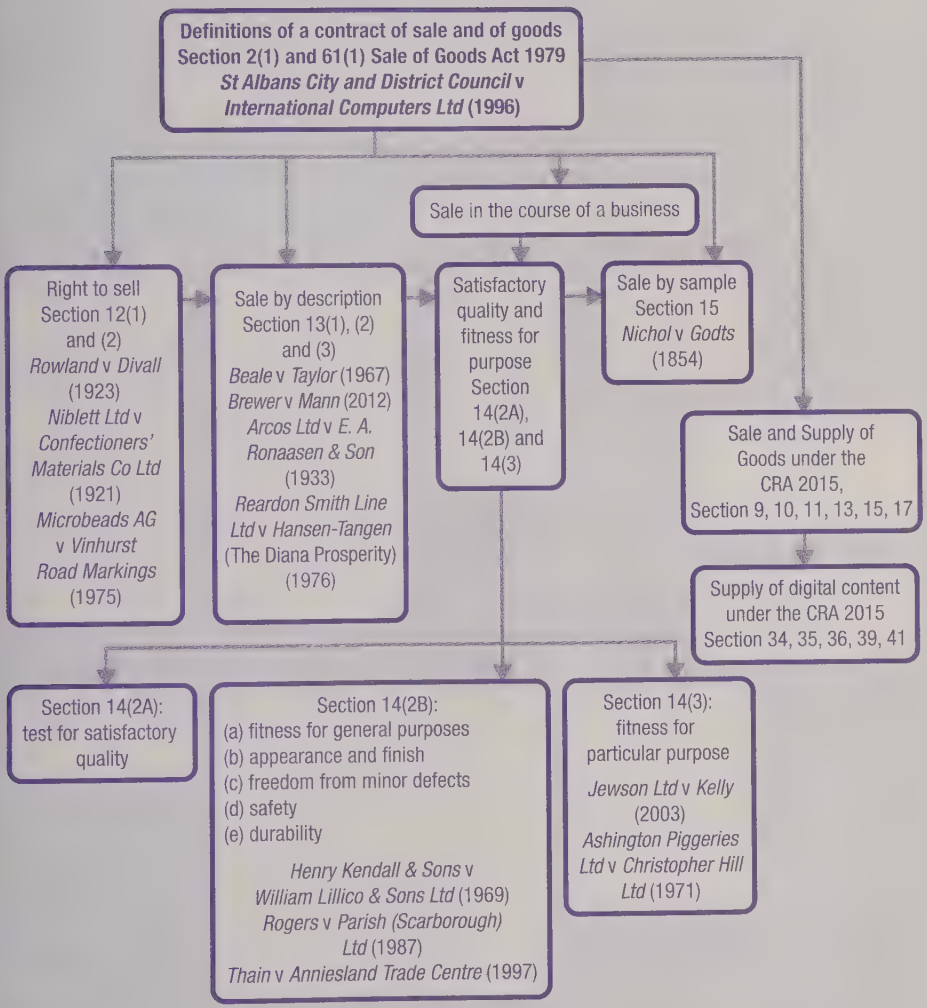
Sale and supply of goods 1: Implied terms

Revision checklist

Essential points you should know:

- What constitutes a contract for sale of goods
- The terms implied by the Sale of Goods Act 1979 and other related statutes
- How implied terms affect both purchaser and seller
- The degree to which liability for breach of implied terms can be excluded in both business and consumer transactions

Topic map


Definitions of a contract of sale and of goods
Section 2(1) and 61(1) Sale of Goods Act 1979
St Albans City and District Council v International Computers Ltd (1996)
Sale in the course of a business
Right to sell
Section 12(1) and (2)
Rowland v Divall (1923)
Niblett Ltd v Confectioners' Materials Co Ltd (1921)
Microbeads AG v Vinhurst Road Markings (1975)
Sale by description
Section 13(1), (2) and (3)
Beale v Taylor (1967)
Brewer v Mann (2012)
Arcos Ltd v E. A. Ronaasen & Son (1933)
Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity) (1976)
Satisfactory quality and fitness for purpose
Section 14(2A), 14(2B) and 14(3)
Sale by sample
Section 15
Nichol v Godts (1854)
Sale and Supply of Goods under the CRA 2015,
Section 9, 10, 11, 13, 15, 17
Supply of digital content under the CRA 2015
Section 34, 35, 36, 39, 41
Section 14(2A): test for satisfactory quality
Section 14(2B):
(a) fitness for general purposes
(b) appearance and finish
(c) freedom from minor defects
(d) safety
(e) durability
Henry Kendall & Sons v William Lillico & Sons Ltd (1969)
Rogers v Parish (Scarborough) Ltd (1987)
Thain v Anniesland Trade Centre (1997)
Section 14(3): fitness for particular purpose
Jewson Ltd v Kelly (2003)
Ashington Piggeries Ltd v Christopher Hill Ltd (1971)

A printable version of this topic map is available from **go.pearson.com/uk/lawexpress**

Introduction

Students of commercial and consumer law need to be aware of the basic principles of contract, to understand the nature of a contract for sale and supply of goods/services.

Contracts that arise out of commercial dealing, while being subject to statutory regulation, are also underpinned by the principles of contract as developed through the process of common law. Therefore, for an agreement to have legal status there must be an **offer** that has been accepted in return for **consideration**, on the understanding that both parties intend the agreement to be binding. Usually parties in making a contract will have agreed terms. In any case, terms concerning title, description, quality/fitness for purpose and sale by sample will be statutorily implied into contracts for the sale and supply of goods.

In this chapter the statutory implied terms referred to in Chapter 2 are analysed in greater detail. Despite the fact that the emphasis is on ss. 12–15 of the Sale of Goods Act 1979 (SGA) only, reference will be made to similar implied terms in other commercial statutes. It is important to note that since 1 October 2015 the Consumer Rights Act 2015 (CRA) has introduced specific rules relating to the sale and supply of goods, and services to consumers. These rules are summarised at the end of this chapter.

Assessment advice

Essay questions

These may require an explanation and evaluation of the case law determining when a sale is a sale by *description,* or how the limitations on satisfactory quality operate. It is necessary to show a detailed knowledge of the case law as well as an ability to highlight and comment on conflicting decisions.

Problem questions

Problems usually outline a scenario where a purchaser of uncertain commercial status buys goods that either do not match their description or may be unsatisfactory. On complaining to the seller, the buyer will be presented with an exclusion clause (or clauses) purportedly covering the buyer's *cause* for complaint. You will be asked to determine the liability of the seller and ascertain whether or not the clauses are effective.

Definition of a contract for sale of goods

Section 2(1) of the Sale of Goods Act 1979 defines a contract of sale of goods as one in which property is transferred from the seller to the buyer for a price.

Sale of Goods Act 1979, s. 2(1)

A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in *goods* to the buyer for a *money consideration*, called the price.

Consideration in contracts for sale of goods must be in the form of money, cash, cheque or credit card, and this makes them distinguishable from contracts of barter. Contracts of hire are also excluded from the definition, as there is no passage of ownership of property in such contracts.

Goods

Goods can be existing or future (s. 5 SGA 1979), specific, **ascertained** or **unascertained**. Existing goods are those which are owned or possessed by the seller, whereas future goods are goods to be manufactured or procured by the seller after making the contract of sale. Specific goods are those identified and agreed on at the time of sale whereas ascertained goods are identified and agreed on after the contract of sale has been made.

Sale of Goods Act 1979, s. 61(1)

. . . 'specific goods' means goods identified and agreed on *at the time* a contract of sale is made (and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid . . .).

The distinction between existing and future goods, and specific and unascertained goods, is important in relation to the passing of property and risk as explained in Chapter 4.

Section 61(1) SGA also defines goods as 'all personal chattels other than things in action'. Therefore, goods must be tangible rather than intangible items. See Table 3.1 below.

'Goods' for the purposes of Sale of Goods Act 1979, s. 61(1)

Table 3.1 Definition of 'goods'

'Goods'	Not 'Goods'
Tangible items that can be physically touched, e.g. a car, furniture, food and severable items, such as agricultural crops	Intangibles, e.g. guarantees Contracts for the sale of land and non-severable items attached to land Contracts for labour and materials, e.g. commissioned works of art

Computer software as 'goods'

Whether or not computer software could be categorised as 'goods' under s. 61(1) SGA 1979 remained uncertain. Sir Iain Glidewell gave some consideration to this issue in the following case.

St Albans City and District Council v *International Computers Ltd* [1996] 4 All ER 481 (CA)

Facts

The defendants installed a computerised database for the plaintiff council's tax system. An error significantly miscalculated the charge, resulting in a loss of £1,314,846. The Council claimed compensation from International Computers Ltd on the grounds that they had breached the implied terms of quality and fitness for purpose under s. 14 SGA 1979. A question arose as to whether or not the database could be classified as 'goods' under the SGA 1979.

Legal principle

While a disk can be categorised as 'goods', the software on it could not. In not being 'goods' as defined under the SGA 1979, the software did not gain protection from s. 14. The court had to resort to the use of implied terms at common law to award the claimant damages.

Analysis

It seems illogical to determine the status of software on the method of its delivery. This case illustrates how a literal interpretation of goods can be 'out of step' with technological advances.

Impress your examiner

In an *obiter* comment in the above case, Sir Iain Glidewell stated that although the software on a disk could not be classified as goods under the SGA 1979, a *disk* deemed defective by virtue of a defect in the software on it could constitute breach of s. 14. However, because the disk was used by an employee of ICL to install the software onto the Council's computer, the disk was not sold. Although the program was transferred into the computer, this was not a transfer of goods, because the program itself did not fall within the definition of 'goods' in the SGA 1979.

Exam tip

You could refer to Steven Hedley's comments in his article 'Defective software in the Court of Appeal' in the *Cambridge Law Journal* in which he points out that under Sir Iain Glidewell's reasoning in the *St Albans* case, the mode of delivery would determine whether or not software could be defined as 'goods'. It would impress the examiner if you referred to the *obiter* comments of Akenhead J in *Mayor and Burgesses of the London Borough of Southwark* v *IBM UK Ltd* [2011] EWHC 549 (TCC) in which he suggested that software could be seen as 'goods' under the SGA 1979 as an attribute of a disk similar to music on a CD. This features as a key case in Chapter 4 as it is concerned with the transfer of property.

Digital content under the Consumer Rights Act 2015

The Consumer Rights Act 2015 now provides protection to consumer buyers of digital content as well as goods. A brief summary of the new provisions for digital content is given at the end of this chapter.

Contract formation in commercial agreements

Entering into a contract for sale of goods is reasonably straightforward as there are no specific formalities.

Sale of Goods Act 1979, s. 4: how a contract of sale is made

(1) . . . a contract of sale can be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

The common law requirements for formation of contract – legal intention, offer, acceptance and consideration – apply. Usually the price in a contract of sale is agreed beforehand, but occasionally the parties may leave the price to be fixed at a future date. The Sale of Goods Act 1979 makes provision for this in s. 8.

Sale of Goods Act 1979, s. 8: ascertainment of price

(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in the manner agreed by the contract, or may be determined by the course of dealing between the parties. ▶

(2) Where the price is not determined as mentioned . . . above, the buyer must pay a reasonable price.

(3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

There is a similar provision in the Supply of Goods and Services Act 1982 (s. 15) (SGSA).

Supply of Goods and Services Act 1982, s. 15: implied term about consideration

(1) Where under a contract for the supply of services, the consideration . . . is not determined by the contract, it is left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties. There is an implied term that the party contracting with the supplier will pay a reasonable charge.

(2) What is a reasonable charge is a question of fact.

The CRA 2015 contains a similar provision under s. 51, which states that the consumer must pay a reasonable price for the services, unless the price is expressly stated or the method of fixing it is set out in the contract. What is a reasonable price is a question of fact.

Impress your examiner

The courts may not apply s. 8 SGA 1979 if they think the parties should have agreed a price. By not agreeing something as fundamental as the price, the court may determine that the agreement is too uncertain to be an enforceable contract.

***May & Butcher Ltd* v *R* [1934] 2 KB 17**

Facts

In a contract for sale of tentage by the government, one of the terms stated that the price should be agreed 'from time to time' as the tentage became available.

Legal principle
This was considered merely an agreement to agree.

Analysis
This decision was based on the fact that the whole contract was uncertain and so it was difficult to determine the intent of the parties. However, in a situation where the price is a minor matter in respect of the other terms of an agreement, then the contract will still be enforceable, since s. 8 would apply.

Impress your examiner

Consideration can be viewed as evidence of legal intent. If so, then is consideration really a necessary reason to enforce a promise? Could other factors show evidence of legal intent or provide good reason to enforce a promise? These might include the behaviour of the parties concerned, deposits or previous course of dealing.

Deposits as evidence of legal intent

A pre-payment may be made as either a deposit or part-payment at the time of making an agreement to purchase. Whether or not this pre-payment is evidence of **legal intent** (where both parties intend the agreement to have legal effect) will depend on what the parties agree to. Where no agreement as to the effect of such a pre-payment is made, it may be seen as a deposit, which is generally regarded as evidence of legal intent to be bound by an agreement and subject to forfeiture. Alternatively, if the pre-payment is seen as a *part-payment*, it can be recovered. However, this would be subject to examination of all the circumstances of the transaction.

Terms implied by the Sale of Goods Act 1979

In Chapter 2, ss. 12–15 SGA 1979 were introduced as examples of terms implied into contracts by statute. The mere fact that they are implied means that they do not have to be *expressed* in any agreement between the buyer and the seller.

- Section 12(1) – it is an implied *condition* that the seller has the *right to sell* the goods.
- Section 12(2) – it is an implied *warranty* that the goods are *free from encumbrances* and the buyer can enjoy *quiet possession.*
- Section 13(1) – it is an implied *condition* that goods sold by description will comply with that description.
- Section 14(2) – it is an implied *condition* that goods sold in the course of a business are of satisfactory quality.

- Section 14(3) – it is an implied *condition* that goods *sold in the course of a business are fit for the buyer's purpose* (provided that it is reasonable for the buyer to rely on the seller's skill and judgement in selecting goods suitable for that purpose).
- Section 15(2) – it is an implied *condition* that *where goods are sold by sample, the bulk will match the sample* and it is implied that the goods are *free from any defects*, which would render the goods *unsatisfactory*, if these defects would *not be apparent on reasonable examination.*

There are similar terms implied into contracts between a trader and consumer by the CRA 2015. Reference will be made to these terms and any amendments at the end of this chapter.

Don't be tempted to . . .

It is easy to overlook the fact that while ss. 12, 13 and 15 SGA 1979 apply to all contracts for sale of goods, s. 14 applies *only* to goods sold in the course of a business. Consequently, in the event of quality issues in private sales, the operative principle is one of ***caveat emptor*** (let the buyer beware).

The right to sell: s. 12

Sale of Goods Act 1979, s. 12(1)

There is an implied condition on the part of the seller that in the case of a sale he has the right to sell . . . and in the case of an *agreement to sell* . . . he will have such a right *at the time* when property is to pass.

When s. 12(1) is breached, the buyer has the right to repudiate the contract and claim a refund of the price, on the principle of total failure of consideration, even if he has used the goods for some time.

***Rowland* v *Divall* [1923] 2 KB 500**

Facts

A car was stolen from its owner (O) and the thief (T) sold it to the defendant (D). The defendant sold it to the claimant car dealer (C) for £334, who painted it and sold it to Colonel Railsdon (CR) for £400. Such a series of transactions can be illustrated as follows:

O (car stolen by T) → T (sold to D) → D (sold to C for £334) → C (sold to CR for £400) → CR

Having recovered the car the police restored it to O; CR then claimed £400 from C, who in turn claimed £334 from D.

Legal principle
It was held that C was entitled to claim back £334 from D because D's *cause of action* was against T, who in fact never had the right to sell anyway. No one except O had the right to sell the car.

Analysis
This reasoning is based on the fact that although possession had been transferred, ownership had not. Furthermore, there had been a total failure of consideration.

Don't be tempted to . . .

Take care not to confuse ownership with the right to sell. No seller needs to own property to have the right to sell it, as is shown when an agent does not own the property he sells, but does have the right to pass title to a buyer by selling it. Conversely, an owner of goods may not have the right to sell them, where by doing so, he would breach copyright laws. The *legal* right to sell and *transfer ownership* should not be confused with *ownership* (in itself).

Niblett Ltd v *Confectioners' Materials Co Ltd* [1921] 3 KB 387

Facts
A company purchased 3,000 tins of condensed milk from the defendants. However, 1,000 of the tins were labelled 'Nissly' and the claimant (company) was told by Nestlé that if they sold these tins they would seek an injunction for breach of their trade mark. The claimants took action against the defendants for breach of s. 12(1) because they were unable to sell the milk without removing the labels.

Legal principle
Section 12(1) had been breached by the defendants. The sellers did, of course, own the milk, but had no right to sell it because Nestlé, in owning the trade mark, were entitled to an injunction to prevent them from doing so.

Analysis
The claimant in this case did not have the right to sell because Nestlé had an existing right of ownership over the product in the form of trade mark rights.

Implied warranties under s. 12

Implied warranties as to possession are provided by s. 12(2)(a) and (b) SGA 1979. The former states that the goods are free from any undisclosed encumbrances or charges, while the latter says that the buyer will be entitled to continuing undisturbed possession, unless by the time of the sale he was made aware of the rights of others over the goods.

Microbeads AG v *Vinhurst Road Markings* [1975] 1 WLR 218

Facts

This case concerns a buyer who purchased some road marking machines which, unknown to both buyer and seller, were subject to a patent application by a third party. The patent was granted after the contract was made whereupon the third party sued the buyer for breach of patent. Thereafter, the buyer claimed against the seller for breach of s. 12(1) and (2).

Legal principle

Section 12(1) had not been breached, as the sellers had the right to sell the machines at the time the contract was made.

Analysis

With regard to s. 12(2)(b), the buyer was still entitled to continued quiet possession, without the prospect of an action for breach of patent by any third party. Of course, in this case the implied term had been breached.

Section 12(1) and (2) will not apply in uncertain circumstances where the seller contracts to transfer a title he does not necessarily possess. Nevertheless, s. 12(4) and (5) implies warranties of quiet possession that require the seller to inform the buyer of any charges or encumbrances known before the contract was made.

Sale by description: s. 13

Sale of Goods Act 1979, s. 13(1)

Where there is a contract for sale of goods by description, there is an implied condition that the goods will correspond with the description.

Beale v *Taylor* [1967] 1 WLR 1193

Facts
A buyer purchased a car after seeing it advertised as 'Herald, convertible, white, 1961'. He discovered later that although the car was a white convertible Herald, the front part of the car was an earlier model.

Legal principle
The seller was liable for breach of s. 13 because the vehicle he had sold was made up of two cars, the rear being dated 1961 and the front part 1948.

Analysis
In this case the whole car did not match its specific description that in itself referred to the identity of the product sold.

In the following case, the whole car was described as 'vintage', being made up of several different components.

Brewer v *Mann* [2012] EWCA Civ 246

Facts
Brewer purchased a car described as a '1930 Bentley Speed Six' on hire purchase terms but later discovered that the engine was not an original Bentley engine but a Bentley engine that had been modified to Speed Six specification. At first instance the court held that the car did not conform to its description.

Legal principle
On appeal the Court of Appeal decided that the description '1930 Bentley Speed Six' did not call for an original Speed Six car. The identity of a vintage car was determined by normal customs of the vintage car trade that allowed for alterations to its engine and bodywork.

Analysis
The decision in this case was based on the rationale of a particular trade practice.

Impress your examiner

It could be suggested that a point of distinction between *Beale* v *Taylor* and *Brewer* v *Mann* was the fact that the car purchased by Beale was both unsafe and illegal as it was a 'cut and shut' vehicle and thereby unsatisfactory and not fit for purpose.

To what extent must the goods correspond with their description?

Formerly, goods had to match their description very closely, which was made clear in the *Arcos Ltd* v *E. A. Ronaasen & Son* case, as outlined below.

Arcos Ltd v *E. A. Ronaasen & Son* [1933] AC 470

Facts

In a contract to buy wooden staves they were found to be 9/16ths of an inch instead of half an inch thick. The buyer, who was looking for a way to avoid the contract as the price of timber had fallen, wished to repudiate for breach.

Legal principle

Although the thickness of the staves made no difference to their usefulness, the purchaser was entitled to reject the whole consignment on the grounds that the description did not match that given to the staves. 'A ton does not mean about a ton, or a yard about a yard . . . ' (*per* Lord Atkin).

Analysis

Lord Atkin did say, albeit *obiter*, that the law will not take notice of 'microscopic deviations'. Later cases have tried to minimise the exercise of the right to repudiate in such circumstances. Also it is useful to note that ss. 15A and 30(2A) of the Sale of Goods Act 1979 now allow a court to refuse to allow rejection where the seller's breach is insignificant.

Goods are 'sold by description' when the buyer *relies* on whatever that description implies. The mere fact that descriptions are attached to goods does not necessarily mean that they have been 'sold by description'. Obviously where goods have not been seen or identified (but have been described) they qualify as goods 'sold by description'. Again, specific goods that have been identified can also be categorised as having been 'sold by description'.

Reardon Smith Line Ltd v *Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 989

Facts

The respondents agreed to charter a tanker which was in the process of being built in shipyard *Osaka No 354*. The ship was, in fact, built in shipyard *Oshima 004*. By the time the tanker was built, the charterers were looking to avoid the contract and claimed that the contract had not been strictly performed because the vessel did not comply with its description.

Legal principle
The House of Lords held that the words describing the shipyard were used as a means of identifying the tanker, and were not meant to be a description of the ship and were, therefore, not a condition of the contract. The charterers were not entitled to avoid their obligations by repudiating the agreement.

Analysis
In this case Lord Wilberforce suggested that a sale will only be a 'sale by description' if the words used to describe the goods refer to a significant part of the *identity* of the goods themselves.

Conditions and implied terms were introduced in Chapter 2. Often parties will look for ways to avoid their obligation; accordingly, the common law developed limitations to the rule of strict performance by applying to the rule precepts such as the doctrine of substantial performance, partial performance and divisible contracts. Likewise, the Sale of Goods Act 1979 contains provisions that restrict the right to reject for breach of a condition. These provisions are examined in more detail in Chapter 5, which deals with performance in contracts for sale of goods.

Re Moore & Co Ltd and Landauer & Co [1921] 2 KB 519

Facts
The sellers sold 3,100 tins of peaches to the buyers, who rejected them because they were packed in boxes of 24 rather than boxes of 30, as described in the contract. It made no difference how they were packed, as the overall amount remained the same.

Legal principle
It was decided that the buyers could reject the whole consignment, since it did not match the contract description.

Analysis
This decision based on a strict compliance with description is surprising in view of the fact that the law is 'not concerned with trifles', unless of course there is a valid and practical reason for insisting on strict compliance.

Impress your examiner

In the *Arcos* and *Re Moore* cases the transaction was a business rather than consumer transaction and the parties were expected to have good reason ▶

to demand strict compliance with descriptions. This is especially important in commodity sales, where it is common for goods forming part of a bulk in transit to be sold on by one commodity dealer to another under the terms of a CIF (cost including freight) contract. Here strict compliance with description is very important, as a subsequent buyer needs to rely totally on the description in the transaction documents. Even so, commercial law, in practice, tends to discourage the strictest of interpretations, as it is 'not concerned with trifles'. Indeed, the Sale and Supply of Goods Act 1994 introduced an amendment to s. 13 SGA 1979 by changing its status to that of an innominate term through s. 15A. As far as consumers are concerned, s. 13 retains its status as an implied condition, but not for business buyers where breach would be so trivial as to make it seem unreasonable for the buyer to reject the goods. In effect, under the present law this might reverse the decision in *Re Moore & Co Ltd and Landauer & Co.*

Reliance on the description

Not only must the description relate substantially to the identity of the goods, but the buyer must *rely* on the said description.

Harlington & Leinster Enterprises Ltd v *Christopher Hull Fine Art Ltd* [1991] 1 QB 564

Facts

Two paintings described as works by Munter – a German expressionist painter – were sold for £6,000. Both the seller and the buyer were art dealers, but the buyer was a specialist in German expressionist art. As it happened, the seller admitted to an employee of the buyer that they knew nothing about Munter's work. In any case, both paintings were fakes, and being worth less than £100, the buyer claimed the right of rejection under s. 13(1).

Legal principle

This was not a sale by description as the buyer had not relied on the description offered by the seller, and so was not entitled to reject the paintings under s. 13(1).

Analysis

This rule of reliance echoes that featuring in cases of misrepresentation – so if a buyer relies on their own judgement rather than that of the seller, there is no cause of action.

Description in sale by sample

A sale by sample is frequently a sale by description and s. 13(2) provides that if the sale is by sample as well as by description, the bulk of the goods must correspond with *both* the sample and description.

Nichol v *Godts* (1854) 10 Exch 191

Facts
Oil, described as 'foreign refined rape oil', was bought by sample. The bulk of the oil matched the sample but neither the sample nor the bulk matched the description. The oil was in fact a mixture of rape and hemp oil.

Legal principle
The buyer was entitled to reject the oil as not matching the description, in spite of its correspondence with the sample.

Analysis
Hence a seller cannot get away with using sale by sample to avoid the obligation to correctly describe the goods sold.

Self-service sales

Just because a buyer selects goods from a display in a shop, it does not prevent a sale from being one of 'sale by description'. When selecting items, buyers often rely on descriptive labels to inform their decision to buy (see s. 13(3)).

Sale of Goods Act 1979, s. 13(3)

A sale of goods is not prevented from being a sale by description just because it is on display.

Exam tip

An exam question on 'sale by description' may also involve issues of quality (under s. 14). Remember that s. 14 applies *only* to goods sold in the course of a business, whereas s. 13 applies to all contracts for the sale of goods. It is useful to point out that the courts have often interpreted a sale as one of sale by description to give a buyer in a private transaction a remedy.

Satisfactory quality: s. 14

Sale of Goods Act 1979, s. 14(2)

Where the seller sells goods *in the course of a business*, there is an implied term that the goods supplied under the contract are of satisfactory quality.

In the course of a business

Section 14 applies only to goods sold in the course of a business and s. 61(1) defines 'in the course of a business' as inclusive of the professions and the public authorities. Since there is no protection regarding the quality of goods given to buyers in private sales, it is important to distinguish between private and business sales to establish potential liability. In many cases it is easy to distinguish business from private sales, but disputes arose where businesses sold goods that were only peripheral to their customary business. However, these kinds of dispute were resolved in *Stevenson* v *Rogers* (1999) (see Chapter 1), in which it was held that sporadic sales that were merely incidental to the seller's business should be construed as sales 'in the course of a business'.

Don't be tempted to . . .

Be sure to highlight the distinction between dealing as a consumer and acting in the course of a business. In *Stevenson* v *Rogers* it was decided that *all* sales carried out by a business should be defined as 'dealing in the course of a business' under s. 14(2) SGA 1979 for the purposes of civil law (see Chapter 1). Sometimes a business *buys* goods that are incidental to its commercial activity and is regarded as *not buying* 'in the course of a business'. Under such auspices a business is given 'consumer' status as a purchaser of goods. Now, dealing in the course of a business – for the purpose of *sales* – under s. 14 SGA 1979 has a different meaning to dealing as a consumer – for the purpose of *purchases* – under SGA 1979 and UCTA 1977 (see Chapter 1).

***Feldaroll Foundry plc* v *Hermes Leasing (London) Ltd* [2004] EWCA Civ 747**

Facts

A company wished to know whether it could rely on the protection given to consumers under s. 6(2) of the Unfair Contract Terms Act 1977, when it purchased a faulty Lamborghini car for the managing director's use.

Legal principle
The company could rely on this section of the Act, as it had dealt as a consumer, and could reject the faulty car, thereby ignoring the clause that excluded liability for 'satisfactory quality'.

Analysis
It is interesting to note that since this case the changes to the definition of consumer introduced by legislation such as the Consumer Rights Act 2015, would make it more difficult for a company to claim consumer protection in that with such a purchase of goods, the company would have to be an individual acting for purposes that are wholly or mainly outside their trade, business, craft or profession.

Impress your examiner

It would be useful to point out that a narrower interpretation of 'consumer' was adopted by the High Court in *Overy* v *Paypal (Europe) Ltd* [2012] EWHC 2659 where a consumer who acted partly for business purposes could not rely on the Unfair Terms in Consumer Contracts Regulations 1999. This should be resolved by the wider definition of consumer given under the CRA 2015, as an individual who acts 'for purposes which are wholly or *mainly* outside their trade, craft or profession'.

Agency

Were an agent, acting in the course of a business, to deal on behalf of a private seller, then the private seller would be seen as acting within the course of a business. Unless, that is, the buyer is aware of the seller's private status, or their attention has been reasonably drawn to it.

Limitations on s. 14(2)

- Defects which are specifically drawn to the buyer's attention attract no liability under s. 14(2C)(a). Retailers often label goods as 'seconds' or 'special purchase' to alert customers to potential defects, albeit not 'specific'.
- Also, a buyer may feel the need to examine goods; in which case the seller will not be liable for defects which *ought* to have been apparent on examination (s. 14(2C)(b)). Of course, if the defect is latent, or difficult to detect, the seller will be liable.
- Lastly, where the sale is by sample, the seller will not be liable under s. 14(2C)(c) for any defects which would have been apparent on reasonable examination, even if the sample were not examined.

Satisfactory quality

A statutory definition of satisfactory quality is given in s. 14(2A) and (2B) SGA 1979 (see Table 3.2). This was inserted by the Sale and Supply of Goods Act 1994.

Table 3.2 Definition of 'satisfactory quality'

Sale of Goods Act 1979, s. 14(2A)	Sale of Goods Act 1979, s. 14(2B)
. . . goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods and price (if relevant) and all other relevant circumstances	. . . the quality of the goods includes their state and condition and the following . . . (a) Fitness for all purposes for which goods of the kind . . . are commonly supplied (b) Appearance and finish (c) Freedom from minor defects (d) Safety, and (e) Durability.

Exam tip

In consumer sales s. 14(2D) and (2E) extend the 'relevant circumstances' mentioned in s. 14(2A) to include any public statements about specific characteristics of the goods issued by the seller, the producer or his agent, particularly in advertising or labelling. These provisions have been inserted into the CRA 2015 as s. 9(2).

Before the 1994 amendment, the word *merchantable* was used instead of *satisfactory*. Goods were of *merchantable quality* if they were of an acceptable standard and usable. For the goods to have been of an *acceptable standard* a buyer would have chosen to buy them, on the same terms, had he known of their condition. As regards *usability*, goods that were usable according to their description were considered merchantable. So where goods could be used for many purposes, but only one purpose was not up to standard, they were still considered merchantable. Thus, the *acceptability* test (which favoured the buyer) was used more often in consumer cases and the *usability* test (which favoured the seller) tended to be used in commercial cases.

Exam tip

As s. 14 is concerned with 'normal' use, the buyer is not required to inform the seller of any purpose he has in mind for use of the goods. This puts the seller in the position of having to hazard a guess as to possible uses the buyer may have for the goods.

***Henry Kendall & Sons* v *William Lillico & Sons Ltd* [1969] 2 AC 31**

Facts
Kendall bought animal feed for pheasants. Unfortunately, the feed was contaminated with groundnut extract that proved fatal to the pheasants but not, however, to other livestock.

Legal principle
This feed was merchantable, because it was only *unfit* for *one* of its purposes.

Analysis
If the buyer had asked if the feed was suitable for pheasants and the seller had affirmed that it was, then this case might have been decided differently as it would have fallen within s. 14(3).

Fitness for purpose for which goods of the kind in question are commonly used

Goods did not then have to be fit for all the purposes for which they were commonly used but it would suffice for them to be fit for, at least, *one or more of their customary purposes*. Following the 1994 amendment, s. 14(2B)(a) seemed to imply that goods must be fit for *all the purposes* for which goods of that type are commonly used, irrespective of the contract being a consumer or commercial transaction.

Exam tip

Be aware of the subtle change in interpretation of s. 14(2B)(a). The courts, generally, seem to be showing a more protective attitude towards those who buy defective products in the course of a business.

Appearance and finish

The general approach to what extent appearance and finish play a part in assessing satisfactory quality is laid out in *Rogers* v *Parish (Scarborough) Ltd* (1987).

***Rogers* v *Parish (Scarborough) Ltd* [1987] QB 933**

Facts
Rogers paid £16,000 for a new Range Rover, which suffered from a number of *minor defects* to the engine and bodywork. After six months' use, the claimant sought to reject the vehicle, on the grounds of 'unmerchantable quality'. ▶

Legal principle
The car was not merchantable, owing to the cost and expected quality of the vehicle. The owner also had the right as well to take pride in his car's appearance.

Analysis
Hence a range of minor defects in a luxury item was deemed to make the car unmerchantable.

Freedom from minor defects

The question as to what constitutes a minor defect that would render a product's quality unsatisfactory is one of degree. A minor defect on a luxury item might make it unacceptable. Even then, much will depend on the nature of the defect in respect of other statutory criteria such as a product's safety or inherent abnormalities. In *Egan* v *Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, the tendency of a car to 'deviate' to the nearside was held to be the result of its 'camber insensitivity' rather than abnormal steering, which was not defective enough for it to be deemed unsatisfactory.

Safety and durability

Safety and durability will be assessed not only according to the intrinsic quality of the goods, but also according to external factors that will probably be due to how the goods have been used. That being so, it would be unlikely that a buyer of a well-used second-hand car could claim unsatisfactory quality, were the car to develop a defect shortly after purchase.

Exam tip

The assessment of satisfactory quality involves using an objective test as to whether a reasonable person would necessarily think the effects of a minor defect were sufficient to make the goods unsatisfactory. Use cases to illustrate just how the courts have applied this test, using the guidelines given in s. 14(2B)(a)–(e).

Thain v *Anniesland Trade Centre* (1997) SLT (Sh Ct) 102

Facts
The buyer paid £2,995 for a second-hand car which was approximately five years old and had an odometer reading of 80,000. When the car developed a fault in the gearbox after two weeks that rendered it uneconomic to repair, the buyer pursued a claim.

Legal principle
The court held that it was sufficient that the car was fit for use on purchase and that in view of the age and price of the car, the buyer assumed a risk of breakdown at any time.

Analysis
This case shows that a buyer should have only reasonable expectations of the durability of a second-hand car.

Fitness for particular purpose

One may negotiate a sale knowing that certain goods are required for a particular purpose. Provision for such purchases is made under s. 14(3) SGA 1979.

Sale of Goods Act 1979, s. 14(3)

Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known –

(a) to the seller . . . any particular purpose for which the goods are being bought, there is an implied condition that the goods . . . are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable . . . to rely on the skill or judgement of the seller . . . .

Typically, this means that when a buyer asks the seller for advice on a particular use of goods, it is normally reasonable for the buyer to rely on the skill of the seller. There may be occasions, though, when it would be seen as unreasonable to rely on the seller's own skill or judgement as the following case exemplifies.

Jewson Ltd v *Kelly* [2003] EWCA Civ 1030

Facts
A property developer claimed that boilers he had bought to install in flats were unsatisfactory, because they did not work well in the flats. Although the property developer and the suppliers had discussed the suitability of the boilers for the flats, the property developer had not *relied* on the skill and judgement of the suppliers.

Legal principle
The suppliers were not in breach of s. 14(3) in this situation, since they had not been truly called on for their 'skill and judgement' by the buyers, who had not ▶

relied on their expertise. Neither were they in breach of s. 14(2) because the boilers were not defective.

Analysis
It is interesting to note in this case that Clarke LJ referred to Lord Diplock's opinion in *Christopher Hill Ltd* v *Ashington Piggeries* [1972] AC 441 where he stated that a buyer does not have to rely on all aspects of the goods' fitness for a buyer's particular purpose; reliance may be partial only. Mr Kelly relied on Jewson only with regard to the 'extrinsic qualities' of the boilers rather than the suitability of their SAP ratings for the flats.

Exam tip

One of the important points that arises from the *Jewson* v *Kelly* case is the distinction between s. 14(2) and (3). Under s. 14(2B)(a) goods that are 'fit for all the purposes for which goods of the kind in question are commonly supplied' will be seen as satisfactory. The boilers in the *Jewson* case worked, although they were not up to the buyer's required standard. Under s. 14(3), once the purpose for using the goods is made clear to the seller, then the standard of the goods to be expected is higher. Take the opportunity to point out to the examiner that in the *Jewson* case, the buyer did not make it clear to the seller the specific purpose for which he required the boilers.

Particular purpose made known to the seller

Any purpose for which goods are bought does not have to be expressed to the seller, since it can be implied from the way the product is sold. When a buyer, for instance, enters a shop to buy something for everyday use, it is assumed that those goods will be fit for the purposes for which they are manufactured and displayed.

Grant v *Australian Knitting Mills Ltd* [1936] AC 85 (PC)

Facts
After purchasing some woollen underpants, Dr Grant contracted severe dermatitis, on account of them being treated with a chemical that had not been properly rinsed out.

Legal principle
A breach of the implied terms of merchantable quality and fitness for purpose had occurred.

Analysis
As to their fitness for purpose, Lord Wright stated that it was implicit in Dr Grant's act of buying the underpants that he needed them for a particular purpose and in choosing to purchase them from the defendants he had relied on their skill and judgement in selecting the stock's wearable qualities.

On occasion, a particular purpose needs to be expressed by the buyer to the seller. In *Griffiths* v *Peter Conway Ltd* [1939] 1 All ER 685, the seller of a tailored Harris Tweed coat was not liable to the buyer who, on wearing it, also contracted dermatitis, as the buyer failed to make it known to the seller that she had abnormally sensitive skin.

Reliance

Still, the buyer must rely fully or partially on the seller's skill and judgement when buying a product for a specific purpose.

Ashington Piggeries Ltd v *Christopher Hill Ltd* [1971] 1 All ER 847

Facts
This case is about the composition of mink food that was made up using herring meal, which contained a compound toxic to mink but not to other animals. Because the suppliers knew the herring meal would be used to make food for mink, quite naturally, the buyers claimed that the meal was unfit for purpose.

Legal principle
Obviously the use of herring meal, sold as an ingredient for mink food, was unfit for this specific purpose.

Analysis
Take the opportunity to distinguish the *Ashington Piggeries* case from *Kendall* v *Lillico*, where it was determined that the food was of merchantable quality, because it fulfilled one of its common purposes of being food fit for animals. The distinguishing factor here seems to be that in the *Ashington Piggeries* case the meal was described as *mink* food, yet in *Kendall* v *Lillico* the product was *animal* feed.

Sale by sample: s. 15

Samples are often used in sales, but this does not necessarily indicate sale by sample. According to s. 15(1) SGA 1979, a contract of sale is a sale by sample where there is an

express or implied term in the contract indicating that it is so. In written contracts it is easy to establish a sale by sample, but in oral contracts the intent of the parties has to be fully determined. Once it has been established that goods are being sold by sample, s. 15(2) imputes two conditions:

- That the bulk will match the sample in quality.

  and

- That the goods are free from any defects (making them unsatisfactory in quality) which would not be apparent on reasonable examination of the sample.

In *Drummond* v *Van Ingen* (1887) 12 App Cas 284, Lord MacNaghten, when describing the function of a sample, stated that 'the sample speaks for itself'. Similarly, s. 13 states that when goods are sold by description they must, above all else, correspond with that declared about their content.

Don't be tempted to . . .

Be sure not to overlook the buyer's obligation to examine the sample. While s. 14 does not require the buyer to examine goods for satisfactory quality, s. 15(2)(c) makes such an examination of a *sample* obligatory. Once again, this is reinforced by s. 14(2C)(c), which allows the seller an *escape liability* for defects in samples that would have been apparent on reasonable examination of the sample.

Implied terms in contracts other than sale of goods

The implied terms in ss. 12–15 SGA 1979 have been extended into contracts of hire purchase, and supply of goods and services. The Supply of Goods and Services Act 1982 provides for three types of contract: contracts:

- for the transfer of goods (where goods are supplied with services).
- of hire.
- for services.

See the topic map at the beginning of this chapter for an outline of these implied terms.

The CRA 2015 has consolidated consumer rights for the supply of goods and services. Table 3.3 illustrates the reforms that have been introduced for the supply of services to consumers.

Table 3.3 Reforms for the supply of services

Terms for the supply of services under CRA 2015	Relationship to SGSA 1982
Section 49(1): The trader must perform the service with reasonable care and skill.	Mirrors s. 13 SGSA.
Section 51: Unless expressly stated or the method of fixing it is set out in the contract, the consumer must pay a reasonable price for the services. A reasonable price is a question of fact.	Similar to s. 15 SGSA except that s. 15 refers to a course of dealing as one of the ways to determine the price.
Section 52: Unless expressly stated or the method of fixing it is set out in the contract, the trader must perform the services within a reasonable time. A reasonable time is a question of fact.	Similar to s. 14 SGSA except that s. 14 refers to a course of dealing as one of the ways to determine what is a reasonable time.

Exclusion of implied terms

Whether or not the implied terms referred to in this chapter can be excluded depends on the status of the buyer, and the effects of the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015. As you may be expected to analyse the effects of excluding liability for obligations under the Sale of Goods Act 1979, you are advised to refer to the Unfair Contract Terms Act 1977, ss. 6, 11, and Sched. 2 in Chapter 2.

Consumer Rights Act 2015

The CRA 2015 applies certain standards to every contract between traders and consumers for the sale and supply of goods as well as digital content. Table 3.4 gives a guide as to how ss. 12–15 of the SGA 1979 have been consolidated and codified by the CRA 2015.

Table 3.4 Definition of 'standards' under CRA 2015

Implied terms in CRA 2015	Relationship to SGA 1979
Section 9: satisfactory quality	Mirrors s. 14(2), (2A) and (2B)(SGA)
Section 10: fit for a particular purpose	Mirrors s. 14(3) (SGA)

Implied terms in CRA 2015	Relationship to SGA 1979
Section 11: goods as described	Similar to s. 13 SGA with some additional rights. Any information that is provided by the trader about the goods is to be treated as included as a term of the contract. Section 11(5): A change to any of that information, made before, during or after the contract, is not effective unless expressly agreed between the consumer and the trader.
Section 13: Sale by sample: goods to match the sample	Similar to s. 15 however with additional rights: (a) The sample is seen or examined by the consumer before the contract is made; (b) The goods will match the sample unless the consumer is alerted to any differences between the sample and the goods before the contract is made; (c) The goods will be free from any defect that makes their quality unsatisfactory and that would not be apparent on a reasonable examination of the sample; (d) There is no mention of the bulk matching the sample.
Section 15: Installation as part of conformity of the goods with the contract	Additional rights: (1) Goods do not conform to a contract to supply goods if – (a) installation of the goods forms part of the contract; (b) the goods are installed by the trader or under the trader's responsibility; (c) the goods are installed incorrectly.
Section 17: Trader to have right to supply the goods etc.	Mirrors s. 12 SGA except that it applies to all contracts for the supply of goods.

Digital Content under CRA 2015

Digital content is provided for in Part 1 Chapter 3 of the Consumer Rights Act 2015.

Chapter 3 applies to contracts between a trader and consumer where digital content is supplied in exchange for a price, or supplied free with paid-for goods, services or other digital content and is generally not available without payment for:

- either the digital content itself, or
- the goods, services or other digital content.

Table 3.5 Comparison between supply of goods and digital content

Supply of goods under the CRA 2015	Supply of digital content under the CRA 2015
Section 9: satisfactory quality	Section 34: mirrors s. 9
Section 10: fit for a particular purpose	Section 35: mirrors s. 10
Section 11: goods as described	Section 36: similar to s. 11 with some additional rights. The digital content must match or be better than any trial version, as well as match any description of it given by the trader. Any change to any of that information, made before, during or after the contract, is not effective unless expressly agreed between the consumer and the trader.
Section 13: Sale by sample: goods to match the sample	Similar to s. 13 but included in s. 36, however, note: The digital content must match or be better than any trial version.
Section 15: Installation as part of conformity of the goods with the contract	Section 39: Supply by transmission: Where in a contract for supply of digital content a consumer's access to the content on a device requires transmission under the trader's arrangements. After transmission the consumer must have access to a processing facility made available by the trader. This processing facility must be available for a reasonable time unless a time is specified in the contract.

Supply of goods under the CRA 2015	Supply of digital content under the CRA 2015
Section 17: Trader to have right to supply the goods etc.	Section 41: mirrors s. 17 (1)(a) & (b) except that there is no reference to encumbrances or quiet possession.

Modifications of transmitted digital content

Sometimes a contract for digital supply allows the trader to modify the content after provision, in which case the content must comply with ss. 34, 35 and 36.

Although traders can improve or add features to the digital content, the modified version must still comply with the description given to the consumer, as well as continue to conform to information given by a trader about any characteristics, functionality and compatibility, subject of course to any agreed changes.

Putting it all together

Sample question

Could you answer this question? Below is a typical problem question that could arise on this topic. Additionally, a sample essay question and guidance on tackling it can be found on the companion website.

Problem question

Mr Plant needed a quick-growing, ground-covering shrub for the botanical garden where he worked. He bought a shrub recommended as 'quick-growing, hardy and compatible with other plants' by the Everlasting Garden Centre (EGC). Having used his trade discount card to pay for them, he still had some shrubs left over, and planted them in his own garden at home. Unfortunately, the shrub turned out to be invasive and toxic and spread rapidly, killing off hostas and lifting up pathways, resulting in damage estimated at £10,000 to the botanical garden. Of course, he also suffered damage to his own garden and what is more, his dog Fleur died after chewing a root.

Advise Mr Plant on **liability** of EGC for:

(a) The botanical garden's loss.

(b) His personal loss as a consumer.

Note: This question introduces a variation on the sample question found in Chapter 2.

Answer guidelines

Approaching the question

Mr Plant has entered into a contract with the Everlasting Garden Centre. The Everlasting Garden Centre could be in breach of contract. The question asks about liability only, so at this stage ignore any issues concerning remedies. The question requires consideration of business and consumer buyers. In this respect you will need to apply the statutory definition of 'consumer' to establish whether or not Mr Plant was dealing as a consumer. Then you should explain the effect of s. 14(2A), (2B) and (3)(a) of the SGA 1979 as well as ss. 34 and possibly 35 of the CRA 2015 before applying the law to the issues in the scenario.

Important points to include

- Have any of the implied terms of the SGA 1979 been breached?
- Is this a sale by description?
- Is the shrub fit for a specific purpose? Does it need to be?
- What would be the effect of the CRA 2015?

Impress your examiner

The fact that Mr Plant works at a botanical garden raises the question of whose skill and judgement he relied on when making his purchases. You need to consider what facts would render the shrubs unsatisfactory. For example, they satisfy some of the descriptive criteria but are not compatible with another type of plant. Is the shrub fit for Mr Plant's intended purpose and fit for 'normal' use? Does the fact that the shrub is incompatible with one type of plant make it usable within its description? You should address the issue of buying as a consumer and as a business to highlight the greater protection offered to consumer buyers.

Key case summary

Key case	How to use	Related topics
St Albans City and District Council v *International Computers Ltd* [1996] 4 All ER 481 (CA)	To consider whether or not computer software can be categorised as goods under SGA 1979	Test of reasonableness under UCTA 1977
May & Butcher Ltd v *R* [1934] 2 KB 17	To give an example of an uncertain agreement	Inchoate agreements; legal intent
Rowland v *Divall* [1923] 2 KB 500	To explain when ownership will not transfer with possession	Failure of consideration. Remedies for breach of condition
Niblett Ltd v *Confectioners' Materials Co Ltd* [1921] 3 KB 387	To show when an owner may not have the right to sell goods	Remedies for breach of condition. Transfer of property in the goods (Chapter 4)
Microbeads AG v *Vinhurst Road Markings* [1975] 1 WLR 218	To give an example of the right to quiet possession of goods	Breach of warranty
Beale v *Taylor* [1967] 1 WLR 1193	To demonstrate non-compliance with description under s. 13 SGA 1979	Unsafe product under General Product Safety Regulations and CPA 1987
Brewer v *Mann* [2012] EWCA Civ 246	To demonstrate compliance with description under s. 13 SGA 1979	Satisfactory quality and fitness for purpose under s. 14 SGA 1979
Arcos Ltd v *E. A. Ronaasen & Son* [1933] AC 470	To illustrate the doctrine of strict compliance with contractual description	Rights of repudiation in contract and sale of goods
Reardon Smith Line Ltd v *Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 989	To demonstrate limitation of the rule of strict contractual compliance with description	Operation of s. 15A SGA 1979

Key case	How to use	Related topics
Re Moore & Co Ltd and Landauer & Co [1921] 2 KB 519	To give an example of the effects of breach of s. 13	Rights of rejection for non-consumer buyers and consumer buyers
Harlington & Leinster Enterprises Ltd v *Christopher Hull Fine Art Ltd* [1991] 1 QB 564	To demonstrate the significance of reliance in sales by description	Misrepresentation
Nichol v *Godts* (1854) 10 Exch 191	To illustrate the relationship between sale by description and sample	Breach of contract, remedies
Feldaroll Foundry plc v *Hermes Leasing (London) Ltd* [2004] EWCA Civ 747	To show the effect of exclusion of liability under s. 14 SGA 1979 when a company deals as a consumer	
Henry Kendall & Sons v *William Lillico & Sons Ltd* [1969] 2 AC 31	To give an example of goods that are usable within their contract description	Sections 13 and 14(2) SGA 1979
Rogers v *Parish (Scarborough) Ltd* [1987] QB 933	To show how s. 14(2A) and (2B) criteria are used to determine 'merchantable' (satisfactory) quality	Remedies for breach of s. 14 SGA 1979
Thain v *Anniesland Trade Centre* (1997) SLT (Sh Ct) 102	To explain the role of durability as a factor to determine satisfactory quality	Section 14 SGA 1979
Jewson Ltd v *Kelly* [2003] EWCA Civ 1030	To illustrate the greater protection offered by s. 14(3) over s. 14(2B)(a) and the importance of reliance on the skill and judgement of the seller	Section 14(2B)(a) and (3) SGA 1979

Key case	How to use	Related topics
Grant v *Australian Knitting Mills Ltd* [1936] AC 85 (PC)	To illustrate breach of implied terms as to quality and fitness for purpose under SGA 1979	Breach of s. 13 SGA 1979. Product liability under CPA 1987
Ashington Piggeries Ltd v *Christopher Hill Ltd* [1971] 1 All ER 847	To explain the significance of partial reliance in s. 14(3) SGA 1979	Reliance on skill and judgement of seller in misrepresentation and breach. Reasonableness factors in UCTA 1977

Key further reading

Key articles/reports	How to use	Related topics
BIS (2012) *Enhancing consumer confidence by clarifying consumer law: Consultation on the supply of goods, services and digital content*, July 2012. www.gov.uk/government/uploads/system/uploads/attachment_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf	To understand the rationale behind the proposed reform of consumer sales, and digital sales	Sale of goods under the Sale of Goods Act 1979. Distance selling and digital content under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
Ervine, W. C. H. (2004) Satisfactory Quality: What Does it Mean? *Journal of Business Law* 684.	To analyse the application of s. 14(2), (2A) and (2B) in case law.	The relationship between s. 14(2) and (3)
Green, S. and Djakhongir, S. (2007) Software as Goods under the Sale of Goods Act, *Journal of Business Law* Mar 161.	To examine how the courts have dealt with digital software under the definition of goods in the Sale of Goods Act 1979	Digital content under the Consumer Rights Act 2015

Key articles/reports	How to use	Related topics
Hedley, S. (1996) Fitness for a Buyer's Particular Purpose, 4 *Web Journal of Current Legal Issues.*	To critically examine the application of s. 14(3) in case law – notably when an unknown external factor intervenes to render goods unfit for a particular purpose	The role of reliance in misrepresentation. Fitness for common purposes under s. 14(2B). Remedies under the Sale of Goods Act 1979
Hedley, S. (1997) Defective Software in the Court of Appeal, 56 *Cambridge Law Journal* 21, 23.	To examine the problem of defining software as goods under the Sale of Goods Act 1979	Transfer of property and risk
Twigg-Flesner, C. (2004) The Relationship between Satisfactory Quality and Fitness for Purpose, 63 *Cambridge Law Journal* No 1 (Mar 2004) 22–24.	To assess the degree of reliance required for the application of s. 14(3) of the Sale of Goods Act 1979	The relationship between s. 14(2) and (3)
White, J. (2015) The Consumer Rights Act: a new regime for digital content, 39 *CSR* 859.	To gain an outline of the provisions for digital content under the Consumer Rights Act 2015	The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

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4

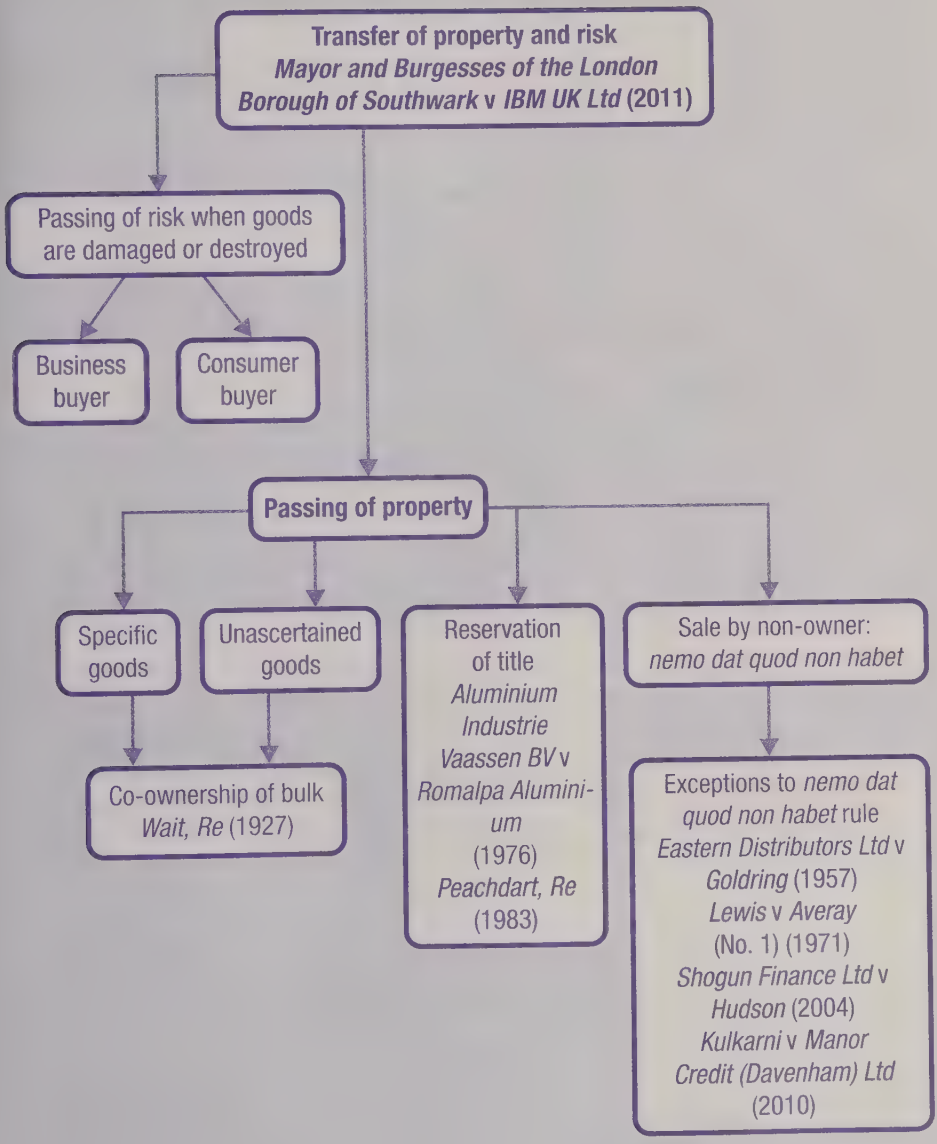
Sale and supply of goods 2: Transfer of property and risk

Revision checklist

Essential points you should know:

- The circumstances under which property passes
- When risk is transferred
- Reservation of title
- Exceptions to the rule of *nemo dat quod non habet*

Topic map


Transfer of property and risk
Mayor and Burgesses of the London Borough of Southwark v *IBM UK Ltd* (2011)
Passing of risk when goods are damaged or destroyed
Business buyer
Consumer buyer
Passing of property
Specific goods
Unascertained goods
Reservation of title
Aluminium Industrie Vaassen BV v *Romalpa Aluminium* (1976)
Peachdart, Re (1983)
Sale by non-owner: *nemo dat quod non habet*
Co-ownership of bulk
Wait, Re (1927)
Exceptions to *nemo dat quod non habet* rule
Eastern Distributors Ltd v *Goldring* (1957)
Lewis v *Averay* (No. 1) (1971)
Shogun Finance Ltd v *Hudson* (2004)
Kulkarni v *Manor Credit (Davenham) Ltd* (2010)

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Introduction

Parties to a contract for sale of goods often agree to their own standard terms for covering precepts like the transfer of ownership, and the allocation of risk.

Whenever there is inadequate provision for these matters, the Sale of Goods Act 1979 (SGA) will imply appropriate terms into a contract anyway.

Assessment advice

Essay questions

These could focus on one aspect of transfer of title, such as reservation of title, and would expect you to demonstrate detailed knowledge of the case law.

Problem questions

Problems may present a scenario or series of scenarios covering several aspects of transfer of property. You will be expected to show a detailed knowledge of relevant sections of the Sale of Goods Act 1979 as well as the common law.

Transfer of property and risk

It is important to ascertain just when property passes, because risk normally passes with property. Exactly who bears the risk when goods are destroyed, or parties become insolvent, will determine who suffers the loss. The parties mostly agree among themselves when property and risk passes from seller to buyer, by inserting clauses – such as a ***force majeure* clause** (a clause that allocates risk in the event of something that might happen) – into their contracts. Should they fail to do so the Sale of Goods Act 1979 applies.

Impress your examiner

You could point out that it is customary in commercial agreements for parties to make provision, with *force majeure* clauses, for what could happen should a particular event arise. These clauses will be effective only if they cover the event. Even then, they may not be enforceable if the predictable event causes exceptional and extensive losses: except where it can be shown that any loss

was, in all probability, likely to occur. In maritime agreements it is common practice to include such clauses to cover the perils of the sea because the Law Reform (Frustrated Contracts) Act 1943 – which deals with division of loss – excludes carriage of goods by sea as well as transport of perishable goods. In effect, this means that the parties should ideally make their own provision for allocation of risk because if they don't, s. 20 of the Sale of Goods Act 1979 will apply.

Sale of Goods Act 1979, s. 20 (passing of risk)

(1) Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer . . .

The section goes on to say that property may transfer to the buyer before delivery.

Mayor and Burgesses of the London Borough of Southwark v *IBM UK Ltd* [2011] EWHC 549 (TCC)

Facts

IBM had contracted to provide software and consultancy services to Southwark Council. Their framework agreement provided for the provision of Websphere, designed by IBM and supplemented by additional pieces of software, one of which was Arcindex, manufactured by Orchard, a separate company. Southwark Council claimed that Arcindex was unsatisfactory and not fit for purpose. The dispute centred around whether Arcindex software provided by Orchard, but supplied by IBM to Southwark Council, was of satisfactory quality or fit for purpose.

Legal principle

There was no transfer, because the parties had agreed that the title, copyright and all proprietary rights over Arcindex remained with Orchard instead of passing to Southwark Council.

Analysis

Therefore because the intellectual property and other rights remained with the seller, the risk remained with the seller as property had not passed to the buyer.

The passing of risk when goods are damaged or destroyed

Business buyers

In the absence of an agreement between buyer and seller, s. 20 SGA 1979 states that the *risk* stays with the seller until property is transferred. The owner has **a title or a right of ownership**: namely exclusive rights and control over the property.

Don't be tempted to . . .

Don't confuse the terms 'ownership' and 'possession'. Possession is not the same concept as ownership. Suppose a right of ownership transfers *before the buyer possesses* the goods, the buyer would then have to bear the risk of loss of those goods even though they are in the seller's possession. For this reason, in a business sale, *risk passes with transfer of property in the goods (or rights of ownership)* whether or not the goods have been delivered to the buyer.

Consumer buyers

The Sale and Supply of Goods to Consumers Regulations 2002 (SSGC) inserted s. 20(4) SGA 1979 to ensure that goods remain at the *seller's risk* until the seller has *delivered the goods* to the buyer. However, this was repealed and replaced by s. 29(2)(a) and (b) of the Consumer Rights Act 2015 with effect since 1 October 2015. This section states that the seller bears the risk until the goods come into the possession of either the consumer or the consumer's approved representative.

The passing of property

The point at which property passes depends on whether the goods are *specific,* or unascertained. Unascertained goods are any goods that have not been identified and agreed upon at the time of the contract, including those chosen from an identified bulk.

Sale of Goods Act 1979

Section 61 defines 'specific goods' as: . . . goods identified and agreed on at the time a contract of sale is made.

Remember, ascertained goods are those that are 'earmarked' for allocation to a purchaser after the contract of sale.

In Chapter 3 specific goods were distinguished from ascertained goods on the grounds that specific goods were identified and agreed upon before or at the time of sale.

The passing of property in specific goods

According to s. 17(1), property in specific goods passes when the parties intend it to pass. A person's intention is determined by his behaviour towards the terms of a contract. How a person's intention is to be determined is governed by the rules in s. 18 (Table 4.1).

Table 4.1 Rules to determine intent in the sale of goods in s. 18

Rule number	When property passes to the buyer
Rule 1: Specific goods unconditionally sold in a deliverable state, even where time of delivery and payment are postponed	At the time of the contract
Rule 2: Specific goods sold on condition they are made deliverable by the seller	When the goods have been made deliverable
Rule 3: Where specific goods have to be weighed, measured or tested by the seller to find the price	Once goods have been weighed, measured or tested and the buyer has been informed of this
Rule 4: Where specific goods are sold on approval or on a sale-or-return basis	When the buyer signifies approval; does an act which adopts the transaction; keeps the goods for longer than the time limit fixed by the contract or for longer than a reasonable time

The passing of property in unascertained goods

Property in the goods cannot pass according to s. 16 until the goods have been ascertained. Where the buyer and seller fail to mention when property passes, s. 18, r. 5 applies (Table 4.2).

Table 4.2 The passing of property under r. 5

Rule number	When property passes to the buyer
Rule 5: Goods must match the contract description, be ready for delivery and have been unconditionally appropriated to the contract either by the buyer with the assent of the seller, or by the seller with the assent of the buyer	Once the goods in a deliverable state have been identified and earmarked for a particular buyer

Ascertainment by exhaustion

This rule, which emanates from the decision in *Karlshamns Oljefabriker A/B* v *Eastport Navigation Corp (The Elafi)* [1982] 1 All ER 208, was inserted into SGA 1979 by the Sale of Goods (Amendment) Act 1995 (SG(A)A) and applies when a buyer may have ordered, say, 100 bottles of wine from a batch of 500, but out of which 400 have already been sold. As long as the remaining 100 bottles of wine are in a deliverable state, they will become *ascertained by exhaustion.*

Co-ownership of a bulk

Another reform introduced by SG(A)A 1994, via ss. 20A and 20B SGA 1979 was the concept of *co-ownership* of a bulk. A necessary reform was needed in light of the unfair decision of the *Re Wait* [1927] case.

Re Wait [1927] 1 Ch 606

Facts

Wait bought 1,000 tons of wheat that was loaded on a ship on 20 November. The next day, he contracted to sell 500 tons of the bulk to X who paid Wait for the consignment on 5 February. However, by the time the ship arrived on 28 February Wait had been declared a bankrupt, four days earlier. In the changed circumstances, Wait's trustee in bankruptcy now claimed the entire load of 1,000 tons on behalf of preferred creditors.

Legal principle

Wait's trustee was entitled to the entire load, whereas X was not entitled to the 500 tons he had bought, as it had not been appropriated (separated from the bulk), so enabling property to pass, even though he had paid for the goods.

Analysis

Section 20(a) of the Sale of Goods Act 1979 rectifies the unfairness of this decision by providing for transfer of ownership to a buyer of part of a bulk that

has been paid for while unascertained. The section also provides for the situation where the bulk has been reduced in total, so that any buyer receives a part proportionate to the amount paid.

Now, s. 20A allows a buyer who has bought a specified quantity from an identified bulk to become *co-owner* of a share of the whole bulk along with other co-owners, as long as a specified amount has been paid for out of an identified bulk. If all of the bulk is destroyed, the whole of the buyer's as well as the seller's share is destroyed. If part of the bulk is destroyed then the seller's share is destroyed first and the remaining co-owners will be entitled to a share proportionate to the price they have paid. Taking *Re Wait* as an example, s. 20A would have allowed X to become a 50 per cent owner of the wheat, the remainder to be allocated to Wait's trustee.

Reservation of title clauses

Reservation of title clauses provide the seller with the power to retain ownership of the goods until they have been paid for by the buyer. Were the buyer to become insolvent before paying for the goods, the seller has the right to retrieve them. The goods remain the buyer's property, without any clause being in place, and will be seized by the liquidator and sold off to pay creditors. Retention of title clauses are often referred to as **Romalpa clauses** due to the following case.

Aluminium Industrie Vaassen BV v *Romalpa Aluminium* [1976] 1 WLR 676

Facts

In this case, AIV sold aluminium foil to Romalpa. The contract of sale included a clause which stated that ownership of the foil would not pass until it had been paid for, and were the foil to be mixed with other products during manufacture, AIV would become owner of the finished product and property in the finished product would not pass until Romalpa had paid for the foil. It also stated that any unmixed foil should be stored separately from products made with the foil and that Romalpa could sell these products on condition that AIV could claim money from the proceeds of the sale. This had the effect of imposing upon Romalpa a fiduciary duty to the sellers. When Romalpa became insolvent before paying fully for the foil, AIV claimed for the unsold foil as well as the proceeds of the sale of the unmixed foil.

Legal principle

As regards the unmixed goods, the clause had reserved title for the sellers who owned the unsold foil, and were also entitled to the proceeds of sale ▶

of the unmixed foil. AIV decided not to claim for the proceeds of sale of the 'mixed goods'.

Analysis
It could be suggested that AIV was wise not to claim for the proceeds of sale of the mixed goods as extended reservation of title clauses have been rejected in a series of cases.

Mixed goods

It is easy to enforce a clearly worded reservation of title clause over goods that are in their original state, as ownership will not pass until payment of price. More often than not goods used in a manufacturing process have their identity changed. Despite the reservation of title clause, property will pass to the buyer, since it is impractical to separate identity of the goods from the finished product. Instead, the courts are inclined to regard reservation of title clauses as a way of establishing a 'charge' that must be properly registered, so as to become security for payment for the goods.

Re Peachdart [1983] 3 All ER 204

Facts
While the sellers of leather for manufacture (into handbags) could reserve title in the leather supplied, they could not reserve title in the finished product. Once made into handbags, the leather changed its identity. The reservation of title clause created a 'property right' as a charge over the handbags and to be effective it should have been properly registered under the Companies Act 1985, s. 395.

Legal principle
As the sellers had failed to register the clause as a *charge*, they were unable to recover either the bags or the proceeds of sale of the bags.

Analysis
Even if the sellers had registered their clause as a charge, under common law they would have not been able to claim proceeds for sale of manufactured goods because the assets (money from sale of handbags in the buyers account) have to be separate from other funds in the buyers account. The sellers would have had to rely on equitable tracing based on a fiduciary relationship in order to claim proceeds of sale of goods as a creditor.

Sale by person who is not the owner

The provisions covering such sales are contained in s. 21 SGA 1979.

Sale of Goods Act 1979, s. 21

Subject to this Act, where goods are sold by a person who is not the owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Only if a seller owns or has the right to sell goods at the time of sale can ownership be passed to a buyer. This is otherwise known as the ***nemo dat quod non habet*** rule (no one can give what he does not have), which usually applies when a buyer purchases stolen property from a thief, to enable the property to be recovered and restored to its true owner. To protect an innocent purchaser, the exceptions to the rule are listed below.

Exceptions to the *nemo dat quod non habet* rule

Estoppel

Estoppel applies where the true owner acts as though the seller has the right to sell. SGA 1979 does not mention estoppel but implies it with the words 'unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell'.

***Eastern Distributors Ltd* v *Goldring* [1957] 2 All ER 525**

Facts

M wished to buy a car on hire purchase (HP) terms so he persuaded C to pretend to be the owner of M's van, and C sold the van to a finance company who supplied the finance for M to purchase the van. The finance was to be used to pay for the van and the car. When the deal to purchase the car did not materialise, M told C the whole deal was off and sold the van to Goldring who bought it in good faith. M failed to pay the HP instalments for the van and so the claimants sued Goldring for the van or its value.

Legal principle

M was estopped from denying that C had the right to sell the car so M's title passed to the claimants who could recover the car. ▶

Analysis
In this case the relationship between M and C was one of agency and so C had the right to sell the car to the finance company on M's behalf, thereby passing good title.

Agency

An agent who sells a principal's goods with actual or implied authority passes 'good title' on to an innocent buyer.

Note: Section 21(1) also recognises ostensible or apparent authority of an agent.

Mercantile agents

A mercantile agent can pass title of goods to a buyer without the authority of the owner (s. 2(1) Factors Act 1889). Section 21(2) SGA 1979 states that nothing in the SGA will affect the Factors Act 1889.

Authority of law

The law allows pawnbrokers to sell goods pledged to them as security for a loan, where a loan has not been repaid. See s. 21(2) SGA 1979, which allows special powers of sale in such circumstances.

Sale by person with voidable title

In cases where a thief has bought goods by deception from a seller who has not taken reasonable steps to check their identity and sells them on to an innocent purchaser, the innocent purchaser will be allowed to retain title to the goods. This is covered by s. 23 SGA 1979: 'When the seller of goods has voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.'

Lewis v *Averay* (No. 1) [1971] 3 All ER 907

Facts
A rogue impersonated a famous actor to buy a car with a bad cheque. Before the car owner discovered the fraudulent misrepresentation, the rogue had sold the car on to the defendant who was an honest purchaser.

Legal principle
The Court of Appeal held that the defendant obtained good title because the claimant had failed to avoid the contract before the car was sold on.

Analysis
This case, which is one of mistaken identity in a face to face transaction follows the precedent created in *Phillips* v *Brooks Ltd* [1919] 2 KB 243.

Impress your examiner

All of the exceptions to the *nemo dat quod non habet* rule require that the purchaser who claims good title must have acted in good faith. According to s. 23 SGA 1979, the burden of proving lack of good faith rests with the original owner, whereas with the other exceptions the burden of proving good faith lies with the person who claims to have acquired good title.

Sale by a seller in possession of goods

This happens when a seller sells previously sold but uncollected goods to a second buyer. Section 24 SGA 1979 states that in such a situation the second buyer will gain ownership of the goods.

Sale by a buyer in possession of goods

A buyer in possession of goods purchased may sell them on to a third party with the original seller's (i.e. owner's) consent. See s. 25(1) SGA 1979, which applies when a buyer in such a position delivers the goods or title documents to a third party acting in good faith so the buyer can pass good title as if he was acting as a mercantile agent.

Exam tip

It is useful to point out that it is not always clear when s. 25 applies; for example, in *Newtons of Wembley Ltd* v *Williams* [1964] 3 All ER 532 it was decided that a buyer in possession who resold goods would have to act according to the requirements of a mercantile agent. Also, if the seller of the goods did not have good title, then the buyer in possession, having purchased the goods from that seller, cannot pass good title under s. 25.

Sale of motor vehicles on hire purchase

Ownership of motor vehicles purchased on HP remains with the seller until all instalments have been paid and the option to purchase exercised. Should a buyer sell a car subject to a HP agreement to a third party, then the car can be recovered. However, the Hire Purchase Act 1964 Part III provides an exception to a private person who

buys a motor vehicle subject to a HP agreement in good faith without notice of defect in title. Because he has bought in good faith, he can then pass on good title to another private person.

Sale of Goods Act 1979, s. 27

(1) This section applies where a motor vehicle has been bailed or (in Scotland) hired under a hire purchase agreement, or has been agreed to be sold under a conditional sale agreement, and before the property in the vehicle has become vested in the debtor, he disposes of the vehicle to another person.

(2) Where the disposition . . . above is to a private purchaser and he is the purchaser . . . in good faith without notice of the hire purchase . . . that disposition shall have effect as if the creditor's title to the vehicle has been vested in the debtor immediately before that disposition.

Any motor dealer or finance company who buys such a vehicle is not protected as they are not seen as private purchasers and are in a position to check a register of HP agreement. However s. 27(3) goes on to say that if a motor dealer or finance company with defective title sells a car subject to HP to a private purchaser, then that private purchaser gets good title subject to s. 27(2).

This exception only applies to motor vehicles, so if X sells a television and a car subject to a HP agreement to Y, a private purchaser, before X has paid off all instalments, Y still gets good title of the car but not the television. However, if any of the sellers in the chain of purchase is a thief, then s. 27 does not apply.

Shogun Finance Ltd v *Hudson* [2003] UKHL 62; [2004] 1 AC 919

Facts

A rogue obtained possession of a car under HP using false ID. He then resold the vehicle to Hudson, a private purchaser, and disappeared. The finance company discovered the fraud and claimed the car from Hudson.

Legal principle

The Lords held that the HP agreement was void for mistake because the finance company intended to deal with the person on the agreement, not the rogue.

Analysis

The rogue was not therefore a seller in possession of the vehicle, but a thief, when Hudson bought it and so Hudson could not rely on s. 27.

In considering whether or not a seller has disposed of a vehicle, timing is essential as is illustrated in the following key case.

***Kulkarni* v *Manor Credit (Davenham) Ltd* [2010] EWCA Civ 69**

Facts
A dealer obtained a car from Manor Credit on HP terms, then breached the HP agreement by selling the car to Kulkarni on the same day. Three days earlier, the dealer had given K the car's registration number so that K could insure it. When MC found out about the sale to K, they repossessed the car, so K claimed against MC in conversion. K claimed that he was a private purchaser from a dealer who was in possession of the car. MC claimed that the car had been transferred before the dealer entered the HP agreement.

Legal principle
The court held that the disposition took place after the dealer had entered into the agreement with MC.

Analysis
It did not occur before because the car was not in a deliverable state; it needed to have its registration plates attached and they were not attached until the day the car was delivered to K. K therefore was protected by s. 27.

Market overt

This applies to goods sold before 3 January 1994 in an established market, in the normal market usage between the hours of sunrise and sunset, to a buyer who acted in good faith without knowledge of defect of title. Section 22 SGA 1979, which allowed this exception, was repealed by SG(A)A 1994 because it effectively allowed a thief to pass good title.

Putting it all together

Sample question

Could you answer this question? Below is a typical essay question that could arise on this topic. Additionally, a sample problem question and guidance on tackling it can be found on the companion website.

Essay question

Explain the effect of a reservation of title clause against a non-paying customer in the following situations. Where the customer:

(a) has gone into liquidation.

(b) has used the product to manufacture goods, which have been sold.

Answer guidelines

Approaching the question

Structure your answer so that you explain the rules on transfer of ownership and reservation of title, before addressing the alternative scenarios. Distinguish clearly between the law regarding unmixed and mixed goods before proceeding to examine how the courts have dealt with individual claims for goods manufactured out of the goods sold.

Important points to include

- Give a brief summary of the passing of ownership for specific and unascertained goods.
- Define a reservation of title clause.
- Explain the purpose of these clauses.
- Outline the rules on passing of ownership on insolvency of the buyer.
- Explain the effect of a reservation of title clause in cases of unmixed and mixed goods.
- Analyse and comment upon the decisions in cases involving mixed goods.

Impress your examiner

Point out the lack of clarity in the law regarding reservation of title clauses. Highlight the impracticality of trying to separate the identity of goods from a finished product where the goods have been mixed. Use cases such as *Re Peachdart* to illustrate how the courts have tried to resolve this by construing a reservation of title clause as establishing a 'charge' on property that will only be enforceable if registered.

Key case summary

Key case	How to use	Related topics
Mayor and Burgesses of the London Borough of Southwark v *IBM UK Ltd* [2011] EWHC 549 (TCC)	To illustrate when property is not transferred	Definition of 'goods' under SGA 1979
Re Wait [1927] 1 Ch 606	To explain how ascertainment by appropriation applies to transfer of property	Sections 20A and 20B SGA 1979
Aluminium Industrie Vaassen BV v *Romalpa Aluminium* [1976] 1 WLR 676	To outline how title is reserved where goods are unmixed	Sections 17, 18, 61 SGA 1979. Remedies under s. 38: seller's lien and right of re-sale
Re Peachdart [1983] 3 All ER 204	To illustrate the effect of reservation of title clauses on mixed goods	Section 20 SGA 1979
Eastern Distributors Ltd v *Goldring* [1957] 2 All ER 525	To provide an example of the exercise of the rule of estoppel as an exception to the *nemo dat quod non habet* rule	Section 12(1) and (2) SGA 1979
Lewis v *Averay (No. 1)* [1971] 3 All ER 907	To describe a situation where a sale was carried out by a person with voidable title	Section 12(1) SGA 1979
Shogun Finance Ltd v *Hudson* [2003] UKHL 62; [2004] 1 AC 919	To provide an example of an exception to the *nemo dat quod non habet* rule: sale by person with voidable title	Types of credit agreement subject to CCA 1974
Kulkarni v *Manor Credit (Davenham) Ltd* [2010] EWCA Civ 69	To demonstrate how important timing is in disposition of goods on hire purchase	Types of credit agreement under CCA 1974. Breach of contract

Key further reading

Key articles/reports	How to use	Related topics
Davies, W. (2006) Romalpa thirty years on – still an enigma? *Hertfordshire Law Journal* 4(2), pp. 2–23.	Comparative examination of reservation of title clauses with a history of reform	Tracing of funds, liquidation of companies, imposition of charges
Merrett, L. (2010) Is Possession Nine-tenths of the Law in the Sale of Goods? 69 *Cambridge Law Journal* 236.	Examines how the rule of *nemo dat quod non habet* has been tempered by a number of common law and statutory exceptions	Agency law, hire purchase, mistaken identity in contract law
Webb, D. (2000) Title and Transformation: Who Owns Manufactured Goods? *Journal of Business Law* 513.	Looks at the effectiveness of extended reservation of title clauses and their effectiveness	Fiduciary relationships, imposition of common law and equitable charges

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5

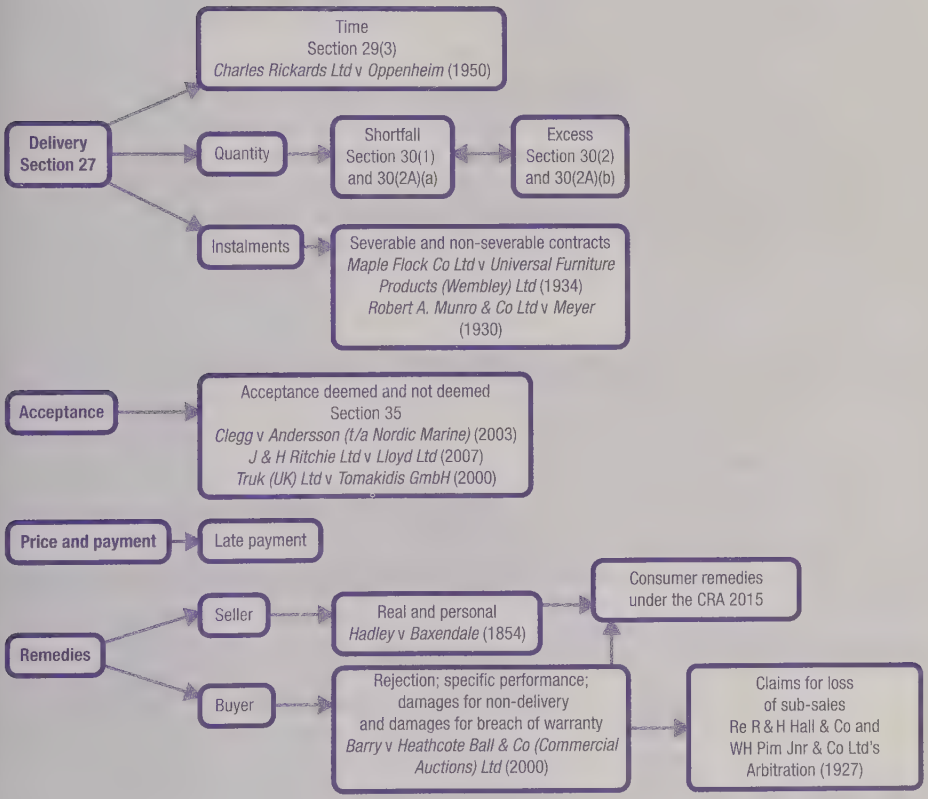
Sale and supply of goods 3: Performance and remedies

Revision checklist

Essential points you should know:

- Duties of the seller regarding delivery of goods
- Rules on acceptance by the buyer
- The duty to pay the price
- Specific remedies for the seller and buyer

Topic map


Delivery Section 27
Time
Section 29(3)
Charles Rickards Ltd v *Oppenheim* (1950)
Quantity
Shortfall
Section 30(1) and 30(2A)(a)
Excess
Section 30(2) and 30(2A)(b)
Instalments
Severable and non-severable contracts
Maple Flock Co Ltd v *Universal Furniture Products (Wembley) Ltd* (1934)
Robert A. Munro & Co Ltd v *Meyer* (1930)
Acceptance
Acceptance deemed and not deemed
Section 35
Clegg v *Andersson (t/a Nordic Marine)* (2003)
J & H Ritchie Ltd v *Lloyd Ltd* (2007)
Truk (UK) Ltd v *Tomakidis GmbH* (2000)
Price and payment
Late payment
Remedies
Seller
Buyer
Real and personal
Hadley v *Baxendale* (1854)
Consumer remedies under the CRA 2015
Rejection; specific performance; damages for non-delivery and damages for breach of warranty
Barry v *Heathcote Ball & Co (Commercial Auctions) Ltd* (2000)
Claims for loss of sub-sales
Re R & H Hall & Co and WH Pim Jnr & Co Ltd's Arbitration (1927)

A printable version of this topic map is available from **go.pearson.com/uk/lawexpress**

Introduction

Where parties to a contract for sale of goods do not make adequate provision in their agreements for delivery, acceptance or remedies, then the Sale of Goods Act 1979 (SGA) will apply.

Assessment advice

Essay questions

These could focus on one aspect of performance, and would expect you to demonstrate detailed knowledge of the rules and their effects.

Problem questions

These may cover *performance* by focusing on scenarios that cover all aspects of performance, or where one or both parties fail to perform a single performance obligation. In both essay and problem questions you will need to address remedies.

Delivery, acceptance and payment

> **Sale of Goods Act 1979, s. 27**
>
> It is the duty of the seller to deliver the goods and the duty of the buyer to accept them, and pay the price.

Delivery

Delivery means transfer of possession, but not necessarily ownership, and may consist of delivering:

- goods to a carrier for transport to the buyer.
- documents of title, such as bills of lading.
- the means of control of the goods to the buyer, for example, the keys to a car.
- or giving goods to a third party who acknowledges holding them on behalf of the buyer.

Unless otherwise agreed, delivery by the seller brings a right to payment (s. 28 SGA 1979). Because the seller's duty to deliver and the buyer's duty to pay are concurrent, the seller can retain the goods until they are paid for.

Time of delivery

Delivery times are often fixed in the contract of sale and if a specified time is not adhered to, the buyer has the right to terminate the contract for non-delivery. Sometimes a buyer waives their right to treat the contract as breached for non-delivery by accepting a much later delivery date. A buyer can still revive this right by giving reasonable notice of an intention to repudiate for non-delivery.

Charles Rickards Ltd v *Oppenheim* [1950] 1 All ER 420

Facts

A *term* in a contract for the supply of a specialist car, to be delivered within seven months, stated that time was of the essence. Despite the fact that the car was not delivered in the specified time, the defendant waived his 'right to repudiate' by agreeing to wait longer. After 10 months, however, the defendant gave notice of his intention to repudiate the contract if the car was not ready within a further month's time. Some 15 weeks later the claimants told the defendant that the car was now ready for delivery.

Legal principle

Having revived his right to repudiate the contract for breach of a *condition*, the defendant had every reason to refuse delivery of the car at the much later date.

Analysis

By giving notice of his intent to repudiate, the defendant had revived 'time is of the essence' as a condition of the agreement.

Where no fixed time has been agreed, delivery must be within a *reasonable* time according to s. 29(3) and what is reasonable will depend upon the circumstances in each case. It is the duty of the buyer to accept delivery once the goods are ready; otherwise, any delay by the buyer to take delivery (at the seller's request) entitles the seller, under s. 37, to make a reasonable charge for care and custody of the goods.

Delivery of wrong quantity

As for a seller who delivers a shortfall or excess in the quantity of goods ordered, then s. 30 SGA 1979 applies (s. 25 CRA 2015) (see Table 5.1). An amendment was introduced by the Sale and Supply of Goods Act 1994 (SSGA) to stop commercial buyers from abusing their right of rejection on unreasonable grounds. By contrast, the rights of consumer buyers are not affected by this amendment.

Table 5.1 Delivery of wrong quantity

Delivery of a shortfall under s. 30(1) and s. 30(2A)(a)	Delivery of a greater quantity under s. 30(2) and s. 30(2A)(b)
Buyer may reject the whole consignment	Buyer may reject the whole consignment
Buyer may accept but will have to pay for the goods at the contract rate	Buyer may accept the goods contracted for but reject the rest
Trivial deviations (s. 30(2A)(a))	**Trivial deviations (s. 30(2A)(b))**
Commercial buyers cannot reject the whole consignment if it would be unreasonable to do so	Commercial buyers cannot reject the whole consignment if it would be unreasonable to do so

A right of partial rejection

In some cases a seller delivers a consignment made up of a mixture of contracted and non-contracted goods. Also, some of the goods in a consignment may be defective. And if that were the case, a right of partial rejection is granted by s. 35A SGA 1979 (s. 21 CRA 2015) enabling the buyer to:

- accept all conforming and reject all non-conforming goods.
- accept all conforming goods and reject some of the non-conforming goods.
- reject all the goods.
- keep all the goods.
- keep most of the goods, but reject only the seriously defective goods.

Note: Section 22 CRA 2015 gives consumers a minimum time limit of 30 days to exercise a short-term right to reject as long as the goods are not perishable and not expected to last for 30 days.

Delivery by instalments

Goods in commercial contracts are frequently delivered by way of instalments. Whether or not a contract is **severable**, is a crucial factor in ascertaining a buyer's right of rejection for unsatisfactory instalments. A severable contract is one that can be divided individually with each part being treated separately.

Section 31 of SGA 1979 (s. 26 CRA 2015) provides for three situations where disputes can arise owing to delivery by instalments (Table 5.2).

Table 5.2 Disputes over delivery by instalments

Nature of agreement in delivery by instalments	Remedy for the buyer
(1) No agreement as to delivery by instalments	Section 31(1): the buyer is not bound to accept delivery by instalments. If he does accept them, he must pay for them but he is entitled to refuse later deliveries
(2) There is agreement to deliver by instalments and the contract is not severable	Breach of a condition in the first instalment will entitle the buyer to repudiate the whole contract. But if one or more instalments have been accepted, he will not be able to reject later instalments if there is a breach of a condition regarding them
(3) There is an agreement to deliver by instalments and the contract is severable	If one or more instalments have been accepted, later instalments can be rejected if there is a breach of a condition (s. 31(2))

Exam tip

Candidates can make the mistake of assuming that where an instalment is paid for separately, it is naturally a severable contract that gives a person the right to repudiate the entire contract. This is not necessarily the case, as s. 31(2) makes clear when it distinguishes between severable breaches; some of which may give rise to rights to repudiate the entire contract, and others, the right to compensation only.

Don't be tempted to . . .

Be sure not to overlook repudiation of whole or part of the contract in severable agreements. Suppose that a contract is severable, when can the buyer regard the whole contract as repudiated? When applying s. 31(2), the court will first assess the degree of seriousness of the breach and will then look at the likelihood of the breach being repeated. The buyer's rights of rejection will depend on the facts in each case, as the following decisions demonstrate.

Maple Flock Co Ltd v *Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148

Facts
The first 15 instalments in a contract to supply 100 tons of flock were satisfactory, as were instalments 17, 18, 19 and 20. Because instalment 16 was proven to be defective, the buyers claimed the right to repudiate the whole contract.

Legal principle
As to whether the buyer was entitled to repudiate the contract depended on two factors. On the one hand, what was the degree of the breach, and on the other, what was the likelihood of it recurring? On neither of these grounds could the court hold the breach to be serious enough to warrant repudiation. Even if there had been a clause stating that each instalment was to be a separate contract, the courts would still regard this as *one* contract, which happened to be severable.

Analysis
The court in this case, applied a practical solution in a situation where the defendants may have been trying to avoid their obligations under the agreement.

Robert A. Munro & Co Ltd v *Meyer* [1930] 2 KB 312

Facts
This case concerned a contract for the sale of 1,500 tons of bone and meal by instalments. As the first instalment, representing 651 tons, was adulterated, the buyers wished to repudiate the entire contract.

Legal principle
There was no obligation on the part of the buyer to accept any future instalments owing to the extent of their current loss.

Analysis
Unlike the situation in the *Maple Flock* case, under these circumstances the buyer was entitled to lose confidence in the quality of the seller's goods and therefore was able to repudiate the whole contract because of the seriousness of the breach.

Acceptance by the buyer

While, at common law, the general rule is that an acceptance completes a legal agreement and therefore cannot be revoked, the Sale of Goods Act 1979 does recognise that in certain situations, although on the face of it acceptance appears to

have taken place, its completion can be delayed. Section 34 SGA 1979 gives a right to the buyer to examine the goods at delivery and, if the sale is by sample, to compare the bulk of the goods with the sample. Provisions governing acceptance are contained in s. 35, which was significantly amended by the Sale and Supply of Goods Act 1994, and the Sale and Supply of Goods to Consumers Regulations 2002 (SSGC). The amendment to s. 35 states that the buyer is *deemed to have accepted* the goods in the situations outlined in Table 5.3.

Table 5.3 When a buyer is deemed to have accepted goods

Relevant section in Sale of Goods Act 1979	Three circumstances in which the buyer is deemed to have accepted goods
Section 35(1)(a) and (b)	1. When he intimates to the seller that he has accepted them
	2. When the goods have been delivered to him and he does any act . . . inconsistent with the ownership of the seller
Section 35(4)	3. When after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them

Yet, as the section goes on to state, under s. 35(2) and (5) the buyer is not deemed to have accepted unexamined delivered goods until he has had a reasonable opportunity to examine them.

Clegg v *Andersson (t/a Nordic Marine)* [2003] 2 Lloyd's Rep 32 (CA)

Facts

Clegg entered into a contract for the purchase of a yacht from Andersson for £236,000 in November 1999. The yacht was delivered to Clegg on 12 August 2000 at which time Andersson told Clegg that the keel was much heavier than the weight given in the manufacturer's specification. Despite this, Clegg told Andersson that he liked the way the yacht handled, having taken it on an eight-day cruise. Later, however, Clegg told Andersson that he did not like the extra stability that the weight gave to the yacht and Andersson told Clegg he would reduce the weight of the keel. Clegg asked for a delay while he consulted his advisers and then eventually rejected the yacht on 6 March 2001. The trial judge held that there had been no breach of s. 14(2) and that Clegg had lost his right of rejection under s. 35. ▶

Legal principle
The Court of Appeal held that the yacht was not of satisfactory quality and that Clegg had not intimated his acceptance under s. 35(1)(a): leaving his personal possessions on the yacht did not intimate acceptance, nor did his initial statement that he liked the way the yacht sailed, as his later reservations indicated otherwise. Neither had Clegg accepted under s. 35(1)(b) because he had done nothing inconsistent with the ownership of the seller. Finally, Clegg had not accepted the yacht under s. 35(4) by keeping it longer than reasonable, because according to s. 59, what is a reasonable time is a question of fact. As Clegg had not received all the information he needed to decide on repair until three weeks before, he decided to reject the yacht.

Analysis
In this case, the court emphasised that s. 35(4) makes it clear that whether or not the buyer had a reasonable time in which to examine the goods was only one of several factors to be taken into account in determining acceptance.

When a buyer is not deemed to have accepted goods

The 1994 amendment to s. 35 added two more provisions to protect a buyer's right of rejection (Table 5.4).

Table 5.4 When a buyer is not deemed to have accepted goods

Relevant provision in Sale of Goods Act 1979	Circumstances in which a buyer is not deemed to have accepted goods
Section 35(6)	(a) When he asks for or agrees to their repair by or under an arrangement with the seller, or
	(b) Where the goods are delivered to another under a sub-sale or other disposition.

***J & H Ritchie Ltd* v *Lloyd Ltd* [2007] 1 WLR 670**

Facts
A farmer bought a seed drill and set of harrows. On first use, the drill was found to be faulty and he returned it to the seller for inspection and possible repair. After a few weeks, the seller told the farmer that the drill had been fixed and was ready for collection. When the farmer asked what was wrong with the drill, the seller

would only proffer that it was 'repaired to factory-gate specification'. As it stood, the farmer was dissatisfied with this response because he could not test the drill and harrows until the next season. Uncertain of its reliability, he sought to reject it and reclaim the purchase price.

Legal principle
Agreement to have the drill inspected, and if necessary repaired, did not constitute *acceptance* by the farmer. He needed to know the nature of the fault to make an informed decision about whether or not to reject the goods. Under the circumstances he was entitled to repudiate the agreement and recover the purchase price.

Analysis
Lord Hope pointed out that as the respondents had failed to provide the appellants with the necessary information about the repairs, the appellant was unable to make an informed decision about retaining the equipment and therefore was entitled to reject.

Truk (UK) Ltd v *Tokmakidis GmbH* [2000] 1 Lloyd's Rep 543

Facts
Tokmakidis, the buyer, made a contract with Truk, the seller, to supply and fit an under-lift to a lorry chassis. Truk was aware that Tokmakidis intended to sell the lorry to a sub-buyer. Tokmakidis was told by the potential sub-buyer that the under-lift was unsuitable, and after official confirmation of its unsuitability for purpose, Tokmakidis sought to reject it, some nine months after purchase.

Legal principle
Where goods are sold for resale, a reasonable time for rejection should be the time taken to resell, plus extra time for the sub-buyer to test out the goods. In this case, a reasonable amount of time is the first six months when the buyer first questioned suitability of the product, plus another three months for investigation of the suitability of the product. So, Tokmakidis was entitled to reject the goods after nine months because he had not, in fact, ever accepted them.

Analysis
The decision in this case is generous to the buyers because the defect could have been discovered on reasonable examination on the day of delivery. It is worth reading Steven Hedley's (2001) article 'Sale of goods – Remedy of rejection – How quickly is the right lost?' in *The Cambridge Law Journal* 60(1), pp. 1–58.

Impress your examiner

All buyers, particularly consumers, are now in a stronger position when they wish to reject defective or unsuitable goods. A consumer's signature on a delivery note is now meaningless in the absence of any opportunity to examine the goods. Also, even where goods have been examined prior to purchase, a consumer has the right to request a further opportunity to examine them. Business buyers can have s. 35 excluded (by agreement, subject to the test of reasonableness in UCTA 1977), whereas s. 35A gives the buyer the right of partial rejection in that they can accept some of the goods and reject others, as long as they do not form part of a commercial unit (s. 35(7)).

Don't be tempted to . . .

Do not overlook the protection to consumers offered by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. These Regulations grant a cooling-off period of 14 days to any consumer who has entered into a contract as a result of 'doorstep' selling.

Price and payment

It is a legal duty of the buyer to pay the contract price at the time of delivery unless any other contractual agreement has been made to the contrary. How the price is fixed is covered by s. 8 SGA 1979.

Details on s. 8 SGA 1979 are given in Chapter 3 as an aspect of consideration. Basically, s. 8 states that the price or how it is to be agreed may be fixed by contract, or may even be determined by a course of dealing. Where no provision for price is made within a contract, the buyer must pay a 'reasonable price' depending on factors like the quality of the goods and their intended use.

Late payment of price will constitute a breach of warranty under SGA 1979, unless the contract says otherwise (s. 10(1)).

Late Payment of Commercial Debts (Interest) Act 1998 (LPCD(I)A)

Because small businesses suffer indebtedness due to late payment, the LPCD(I)A 1998 gives businesses the right to charge interest at 8 per cent above the base rate without going to court. The interest is charged from the date on which it was agreed payment should be made. In the absence of any contractual payment date, the interest charge commences at 30 days after the contract has been performed, or 30 days after the

debtor has been given notice to pay. A court has the right to award this statutory rate of interest, should the business take legal action against the debtor.

Don't be tempted to . . .

Don't forget to mention the practice of contracting out of the right to statutory interest. Commercial buyers in a dominant bargaining position may try to persuade small business sellers to forego their right to statutory interest by means of an exclusion clause within their contracts. Any term attempting to exclude a seller's right to claim statutory interest is declared void, unless a significant reward can be offered as an alternative remedy.

Remedies of the seller

The remedies available to a seller fall into two categories: **personal remedies** (those that are sought personally against the buyer for compensation of loss) and **real remedies** (those sought against the goods themselves).

Unlike personal remedies, real remedies are aimed at the goods rather than the person.

Personal remedies of the seller

The following personal remedies are open to the seller:

- An action for the price.
- Damages for non-acceptance.
- Damages for refusal of delivery.
- Termination of the contract.

Action for the price under s. 49

An action for the price can be taken by a seller when the property has passed to the buyer (s. 49(1)) or when payment has not been made by a specified date, irrespective of whether the property in the goods has passed to the buyer (s. 49(2)). Both sections require that the buyer has wantonly neglected or refused to pay the price.

Exam tip

It is worth pointing out that when suing for the price the rules of remoteness of damage as stated in *Hadley* v *Baxendale* (see below) do not apply.

Damages for non-acceptance

An unpaid seller may prefer to sue for damages for non-acceptance in cases where a buyer neglects or refuses to accept and pay for the goods. The usual measure for damages is the loss directly resulting in the course of business from the buyer's breach (s. 50(2)). However, where there is an available market for the goods, s. 50(3) encourages the seller to claim the difference between the contract price and the market price at the time when the goods ought to have been accepted.

Exam tip

A problem arises when there is no available market for the goods in question. It could be that, owing to over-supply, there is no available market for the goods, so preventing the seller from mitigating any loss. If this was the case, the seller would be able to claim for actual loss as long as it was foreseeable within the rules of *Hadley* v *Baxendale*. In this way, a seller could claim for loss of profits.

Hadley v *Baxendale* (1854) 9 Exch 341

Facts

A miller sent his broken crankshaft for repair by means of the defendant carrier. The defendant was late in delivering the shaft and as a result, the mill was idle for a few days. On which grounds, the miller claimed damages for lost profits.

Legal principle

The court laid down the principles of remoteness of damage as follows:

(1) *Normal losses* as those that arise naturally from the breach (in the usual course of events) can be recovered.

(2) Damages for *abnormal losses* can only be recovered if the loss may reasonably be in the *contemplation* of the parties when they made the contract.

Analysis

In this case, because the mill owner did not inform the carrier of the fact that his mill would be idle without the crankshaft, he was prevented from recovering damages. The court pointed out that not all broken crankshafts render a mill inoperable; for example some mills carry a spare crankshaft in anticipation of such circumstances.

In the above case, it was held that the losses outside rule 2 could not be claimed.

Damages for refusal of delivery

> **Sale of Goods Act 1979, s. 37**
>
> When a seller, who is ready and willing to deliver goods, finds that a buyer does not take delivery within a reasonable time, then any loss caused by this delay (or charge for looking after and keeping the goods while awaiting take up) can be claimed against the buyer.

Clearly any damages claimed by the seller must compensate for delay in accepting delivery rather than for loss of a bargain that results from the delay. There again, reasonable charges for looking after the goods could include compensation for insurance or transport costs, too.

Seller's right to terminate the contract

Once the buyer repudiates a contract, the seller can 'accept' and with that treat the contract as terminated, and then claim for damages. Care should be taken when terminating a contract in this way in case the buyer takes an action against the seller for wrongful repudiation, as happened in the *Hong Kong Fir Shipping* case (see Chapter 2).

Real remedies of the seller

Real remedies are only available to an *unpaid* seller.

> **Sale of Goods Act 1979, s. 38**
>
> A seller is unpaid:
>
> (a) when the whole of the price has not been paid.
>
> (b) when a **bill of exchange** or other negotiable instrument has been received as conditional payment, and the condition . . . has not been fulfilled.

The effect of s. 38 is to allow the seller to be defined as an unpaid seller where a buyer has been given credit or where the buyer pays by a cheque that is dishonoured.

In the face of a betrayal of payment, there are three real remedies available to an unpaid seller:

- a **lien** on the goods.
- right to stop goods in transit.
- right to resell the goods.

Lien on the goods

A lien is the right to hold on to the property of another and keep it as security until an obligation has been performed. An unpaid seller may exercise a lien over the goods even when ownership has passed to the buyer in the following circumstances:

- Where the goods have been sold without credit conditions.
- Where the goods have been sold on credit but the credit period has expired.
- Where the buyer has become insolvent.

As soon as the outstanding price has been paid by the buyer (or the buyer's liquidator) the seller will at once be obliged to hand over the goods. Nevertheless, the right to a lien is lost when the seller hands the goods to a carrier without retaining the right of disposal, or when the right to a lien has been given up. In a severable contract where each instalment is paid for separately, the seller cannot hold on to one instalment as a lien for another that has yet to be paid.

Stoppage in transit

Goods in transit can be stopped by the seller, before the goods are delivered to the buyer, only if the buyer has become insolvent (s. 46). When goods are sent to a destination that the buyer then alters, transit ceases, since the carrier is seen as retaining them on behalf of the buyer. So, goods cannot be stopped in transit should the buyer instruct a carrier to take them to another place. In practice, this right is rarely used in commercial cases as it is common for sellers to use retention of title clauses in their conditions of sale.

Right of resale

Section 48 provides a remedy for the right of 'resale of goods' in the following circumstances, where:

- the goods are perishable.
- the seller gives notice of his intention to resell and the buyer does not pay within a reasonable time.
- a term of the conditions of sale gives the unpaid seller the right of resale.

Buyer's remedies

Remedies available to the buyer include:

- the right of rejection.
- specific performance.
- remedies under the Consumer Rights Act 2015 (SGA) (consumer buyers only).

- damages for non-delivery.
- damages for breach of a warranty.

The right of rejection

Rights of rejection (or non-acceptance) have already been dealt with earlier in this chapter. As was said in Chapter 3, all types of buyers can repudiate a contract for breach of s. 12 SGA 1979. But whereas the right of rejection for breach of ss. 13–15 applies to consumers only, it may not apply to commercial buyers who reject goods for trivial reasons. For example, s. 15A SGA 1979 limits the right of rejection for non-consumer buyers if the breach is so slight as to make rejection seem unreasonable. Of course, a commercial buyer in negotiating terms of a sale can always insist that s. 15A does not apply, thereby retaining full rights of rejection.

Specific performance

An order of specific performance requires the seller to fulfil an obligation to supply goods to a buyer but is rarely granted. It may be granted where a seller has agreed to sell a unique item, but will not be granted in the following situations:

- Where damages would be enough.
- To a party who has not behaved fairly.
- Against a party who would suffer undue hardship.
- In contracts involving personal services.
- In favour of or against a minor.

Damages for non-delivery

Provision for damages for non-delivery is effected by s. 51 SGA 1979.

Sale of Goods Act 1979, s. 51

(1) Where the seller wrongfully neglects or refuses to deliver goods . . . the buyer may maintain an action . . . for damages for wrong delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market . . . the measure of damages is *prima facie* . . . the difference between the contract price and the market or the current price . . . at the time they ought to have been delivered . . .

This section allows a buyer to either **mitigate** their loss, if the market price has gone down; or fulfil their expectations of cost, if the market price has risen.

***Barry* v *Heathcote Ball & Co (Commercial Auctions) Ltd* [2000] 1 WLR 1962**

Facts

Barry bid £400 for two engine analysers at an auction. Given that the analysers were worth £14,000, the auctioneer refused to honour Barry's bid because he felt it was far too low. In fact, the analysers were sold at or around the market price to another buyer, a few days later. Barry sued for the difference between the market price and his bid, as no reserve price was set for the analysers at the auction.

Legal principle

In this case, the Court of Appeal inferred a collateral contract existed between the auctioneer and a potential buyer and in the absence of a reserve price the auctioneer should really have sold the analysers to Barry for £200 each. Because the auctioneer failed to honour this collateral obligation, Barry was entitled to claim the difference between the contract price and the market price.

Analysis

In this case the buyer was allowed to recover damages for loss of a bargain.

As for profits from expected sub-sales, only foreseeable losses are recoverable.

Damages for breach of a warranty

Where there is a breach of a warranty, a buyer cannot reject the goods but can either sue the seller for damages, or deduct damages from the price of the goods under s. 53. The measure of damages is subject to the rule on recovery of normal losses under *Hadley* v *Baxendale.*

Buyer's remedies for breach of warranty under ss. 53 and 54 SGA 1979

Section 53 applies where the seller has breached a warranty, or the buyer has chosen not to reject the goods, and thereby treat the seller's breach of a **condition** as a breach of a **warranty**.

From the buyer's point of view only, s. 53(1) states that they can *either* sue for damages *or* deduct them from the contract price. Should the buyer decide to sue, then, any assessment of damages is dealt with under s. 53(2) and (3).

- s. 53(2) provides that the measure of damages is as for rule 1 in *Hadley* v *Baxendale,* which is, as an assessment of 'normal losses', i.e. *a natural consequence of the breach.*

- Whereas s. 53(3) stipulates that (at first sight) the damages are to be assessed as the 'difference between the value of the goods as they are at the time of delivery, and the value that they should have been, if, the warranty had not been breached'. This is termed as being the 'normal loss' measure.
- s. 53(4) allows the buyer who has elected to sue under s. 53(1) for deduction from the price to sue for further damages suffered (e.g. cost of storage, transport or labour).

Don't be tempted to . . .

Do not confuse s. 53(4) with s. 54 which allows both the buyer and the seller to claim for loss of interest or '*special damages*', such as loss of a 'third party' sale. These kinds of claim fall under rule 2 of *Hadley* v *Baxendale*, which are defined as 'abnormal losses'. To claim these as losses, both parties should have foreseen them, as a possible consequence of the breach when the contract was made. As well as providing for claims for breach of warranty, s. 54 can be used also to claim for special damages arising out of a breach of delivery arrangements (see s. 51).

Saipol SA v *Inerco Trade SA* [2014] EWHC 2211

Facts

Inerco agreed to sell to Saipol 3,000 MT of sunflower oil that was to be shipped, as part of a consignment of 16,600 MT of sunflower oil, belonging to five other sellers. Once unloaded, it was found that the oil had been contaminated. Saipol's claim for breach of ss. 13 and 14 of the Sale of Goods Act 1979 was referred to an Arbitrator, who upheld the claim, and awarded damages under s. 53(3) for the deterioration in value of the oil, together with the costs of storage of their part of the contaminated cargo. The Arbitrator referred both parties to the Commercial Court, to clarify whether the claim was limited to difference in value under s. 53(3), and if, by comingling the oil, it meant that Inerco was therefore liable (under s. 54) for any claims against Saipol by its third-party sub-buyers.

Legal principle

Judgment held that Inerco was only liable for the 3,000 MT of cargo because Saipol had run the risk of total contamination, by agreeing beforehand to comingle their oil with that of other sellers. Furthermore, Saipol could not claim for loss of sub-sales under s. 54, as Inerco was unaware of any third-party agreements. As both s. 53(2) and s. 53(3) fall under the first rule of *Hadley* v *Baxendale* the claim could not be restricted to deterioration in value, but should have been ▶

considered initially under s. 53(2) for consequential losses. Therefore, the claim was referred back to Arbitration for reconsideration of damages under s. 53(2).

Analysis
This decision reiterates that the measure of damages for breach of warranty in relation to quality in s. 53(3) of the SGA is only a *prima facie* measure and does not prevent a claimant from claiming under the first limb of *Hadley* v *Baxendale* for any and all loss directly and naturally resulting from the breach; s. 53(2) thereby preserves claims under the first limb of *Hadley* v *Baxendale*.

Claiming for loss of sub-sales

In most cases, the effect of a sub-sale is ignored, and s. 51(3) applies. However, special damages may be recoverable (under s. 54) to compensate for the loss of resale, provided they are not too remote, as laid down in *Hadley* v *Baxendale*, and they fulfil the following conditions suggested in *Re R & H Hall & Pim's Arbitration*.

Damages for loss of sub-sale are recoverable subject to the following conditions:

- Where the business buyer contracts to resell the same goods to the sub-buyer that cannot be substituted by other goods.
- When the business buyer makes the resale agreement, before the seller's breach.
- Where the seller can reasonably foresee that the goods he sells will be sold on as a sub-sale by the business buyer.
- Where the resale price has not been overly inflated (for example).

Re R & H Hall & Co and W H Pim Jnr & Co Ltd's Arbitration [1927] 30 Ll L Rep 159

Facts
A buyer agreed to buy a cargo of wheat at 51s 9d per quarter on 3 November. As it was, the contract between the seller and buyer allowed for the prospect of sub-selling. On 21 November, the buyer made a sub-sale of the cargo at 56s 9d per quarter. On 22 March, the seller then refused delivery when the market price reached 53s 9d per quarter.

Legal principle
The buyer was awarded damages of 5s per quarter, which was the difference between the contract price and the sub-sale price. Damages were also awarded

for losses claimed by the sub-buyers, for the 'first buyer's' breach of the contracts of sub-sale.

Analysis
Damages were awarded in this case because a resale of identical goods was contemplated in the original agreement and the goods were sold on at a reasonable price.

Consumer remedies

Former remedies for consumer buyers under ss. 48A–48F SGA 1979

For consumer buyers until 1 October 2015, ss. 48A–48F provided remedies if the goods did not conform to the contract at any time from delivery for up to six months as follows:

- Replacement or repair of goods (s. 48A(2)(a) and s. 48B) subject to giving the seller reasonable time (s. 48D).
- Reduction of the price or **rescission** of the contract (s. 48A(2)(b)(i) and (ii) and s. 48C). Rescission sets the contract aside and restores the parties to their pre-contractual position.
- An application by the consumer buyer for specific performance of the seller's obligation to repair or replace the goods (s. 48E(2)).
- Under s. 48E(4) a court could award another remedy under ss. 48B or 48C apart from that applied for. The court could also grant any ss. 48B or 48C remedy unconditionally or conditional as to damages, payment or as it saw fit.

It is important to note that the right to repair or replacement was not absolute and could be refused if it was impossible, or disproportionate to other remedies. Also, price reduction and rescission were available in circumstances where the seller had not replaced or repaired the goods within a reasonable time or where such replacement or repair would be to the buyer's inconvenience.

Remedies for consumer buyers under the Consumer Rights Act 2015

Table 5.5 gives a summary of remedies for breach of statutory rights concerning the sale and supply of goods and digital content with effect since 1 October 2015.

Table 5.5 Remedies for breach of statutory rights under CRA 2015

Statutory right	Remedy under CRA 2015
Satisfactory quality (s. 9); fitness for purpose (s. 10); matching sample (s. 13) or model seen or examined (s. 14); non-conformity of digital content (s. 16)	short-term right to reject (ss. 20–22) right to a repair or replacement (s. 23) right to a price reduction or the final right to reject (s. 24)
Incorrect installation (s. 15)	right to a repair or replacement (s. 23)
	right to a price reduction or the final right to reject (s. 24)
Trader's right to sell or transfer goods or possession (s. 17)	right to reject (s. 20)
Goods free from encumbrances or unknown/undisclosed charges (s. 17(2) and 17(5))	damages under s. 19(9)
Enjoyment of quiet possession (ss. 17(2), (3), (6) and (7))	
Satisfactory quality (s. 34), fitness for purpose (s. 35) and description (s. 36) of digital content	right to a repair or replacement (s. 43); or
	if not possible, or not resolved, right to a price reduction (s. 44)
Pre-contractual information on digital content (s. 37)	right to a price reduction (s. 44)
Damage to device or other digital content (s. 46)	right to repair of the damage
	appropriate compensation (s. 46).

Short-term and long-term rights of rejection under the CRA 2015

The short-term right to reject allows for a minimum of 30 days unless the goods have a life span less than 30 days. The final right to reject is used when a repair has not been possible or has not corrected the fault. For most goods rejected in this manner a consumer will be entitled to a full refund within the first six months: thereafter a deduction will be made for wear and tear. The most notable exception is for motor vehicles (not mobility scooters) where a deduction can be made.

Don't be tempted to . . .

Don't forget that the trader is entitled to a refund under the CRA for the consumer's breach of the right of the trader to provide digital content (s. 41).

Impress your examiner

It is useful to point out that there is limited provision under the CRA 2015 regarding costs of postage and obligations to return defective items apart from stating that the trader must repair or replace goods within a reasonable time and without significant inconvenience to the consumer. Where the consumer requires a refund only – a frequent requirement when goods are sold over the internet – the CRA 2015 is less clear. The Department for Business, Energy and Industrial Strategy (BEIS) has given non-binding guidance to businesses on this issue: namely that a refund must be given without undue delay – within 14 days of the trader agreeing to granting a refund – and the trader is responsible for the reasonable cost of returning the goods. One problem with returning goods is that they may be bulky and inconvenient to return. A recent ruling by the Court of Justice of the European Union (*Fulla* v *Toolport GmbH (Case C-52/18)* [2019] WLR(D) 301, ECJ) suggested that in such instances a business should arrange to collect the goods and pay for their return.

Statutory remedies under the Consumer Right Act 2015 for the supply of services

The following table summarises the remedies available under the CRA 2015 for breach of contracts for the supply of services.

Table 5.6 Remedies under CRA 2015 for the supply of services

Statutory right	Remedy under the CRA 2015
Reasonable care and skill (s. 49)	Right to ask for a repeat performance (ss. 54 and 55)
Performance of service not in line with information provided about it (s. 50)	If it is impossible or is not carried out within a reasonable time without inconvenience, the right to price reduction (ss. 54 and 56)

Statutory right	Remedy under the CRA 2015
Service not performed within a reasonable time (s. 52)	The right to a reduction in price (ss. 54 and 56)
Service not performed in line with information about the trader (s. 50)	

Putting it all together

Sample question

Could you answer this question? Below is a typical problem question that could arise on this topic. Additionally, a sample essay question and guidance on tackling it can be found on the companion website.

Problem question

Eve has been running a garden centre for the past 20 years. She regularly deals with Headline Gardens Ltd (HG) for the purchase of garden supplies. Sometimes orders are delivered in instalments and at other times as an entire contract.

Lately HG has failed to deliver the right type and quantity of plants. On occasions deliveries have been late. When deliveries of garden tools are made to Eve, she tends not to check them until they are ready to be sold. Sometimes she has found that some of the tools are defective or of the wrong specification.

HG has caused much inconvenience to Eve who is beginning to fear a loss of reputation because of poor quality products and service provided to customers. Furthermore, Eve has suffered a substantial financial loss owing to a failure to honour several contracts for the supply of plants for garden parties and public events.

Advise Eve as to:

(a) HG's liability for poor performance of the contract.

(b) The remedies available to her should she succeed in a claim for breach of contract.

Answer guidelines

Approaching the question

The question is concerned with delivery, acceptance and rights of rejection in contracts that may be by instalments or entire, as well as remedies for the buyer.

Important points to include

- Time of delivery (s. 29).
- Quantity where there is a shortfall of delivered goods (s. 30(1), s. 30(2A)(a)); and where there is an excess (s. 30(2), s. 30(2A)(b)). When the right of partial rejection operates (s. 35A).
- Right of rejection where the contract is by instalments and the contract is severable (s. 31).
- Acceptance of the tools (s. 35(3)).
- Remedies of the buyer: rejection subject to triviality (s. 15A); damages for non-delivery (s. 51); damages for breach of warranty (subject to rule of remoteness of damage).

Impress your examiner

Focus on the facts given in the problem to apply relevant sections of SGA 1979. Also, you need to identify Eve as a commercial rather than a consumer buyer. With regard to late delivery, you should mention that in the absence of contrary agreement, s. 29(3) SGA 1979 states that delivery should be within a reasonable time and what is reasonable depends on the circumstances. When addressing the delivery of incorrect quantities of plants you will need to detail Eve's rights of rejection, pointing out that the s. 30(2A)(a) and (b) provisions for trivial deviations apply to commercial buyers (but not consumer buyers). As regards the tools, show that you understand the right of partial rejection granted by s. 35A for defective goods. Where delivery of any of the goods is by instalments, you need to emphasise that whether the contract is severable or not will determine Eve's right of rejection. Don't forget to give detail about Eve's remedies under s. 31. Use case law to demonstrate whether or not Eve can reject the entire contract. When looking at deemed acceptance, you need to bear in mind that the facts of the problem limit your considerations as to s. 35(4). Finally, when explaining remedies you should point out that damages for non-delivery under s. 51 are for consequential loss, whereas damages for breach of warranty are subject to the remoteness of damage rules.

Key case summary

Key case	How to use	Related topics
Charles Rickards Ltd v *Oppenheim* [1950] 1 All ER 420	To demonstrate rights of repudiation on giving reasonable notice	Remedies for breach of condition
Maple Flock Co Ltd v *Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148	To show how s. 31(2) applies to severable agreements	Section 15A SGA 1979, no right of rejection of whole consignment for trivial breaches
Robert A. Munro & Co Ltd v *Meyer* [1930] 2 KB 312	To demonstrate when a buyer can repudiate the whole contract	Rights of repudiation for breach of a condition
Clegg v *Andersson (t/a Nordic Marine)* [2003] 2 Lloyd's Rep 32 (CA)	To explain non-acceptance of goods under s. 35(1)(a), (b) and (4)	Section 14(2A), (2B)(d) SGA 1979
J & H Ritchie Ltd v *Lloyd Ltd* [2007] 1 WLR 670	To illustrate when a buyer has the right to reject goods after a repair under s. 35(6)(a)	Rights of rescission
Truk (UK) Ltd v *Tokmakidis GmbH* [2000] 1 Lloyd's Rep 543	Explaining the effect of s. 35(6)(b) SGA 1979	Buyer's rights of rejection under Sale of Goods Act 1979
Hadley v *Baxendale* (1854) 9 Exch 341	To emphasise that the rules on remoteness of damage do not apply to seller's action for the price	Remoteness of damage does apply to buyer's claim for damages under s. 53
Barry v *Heathcote Ball & Co (Commercial Auctions) Ltd* [2000] 1 WLR 1962	To give an example of damages claimed by the buyer at the available market price	Expectation loss
Saipol SA v *Inerco Trade SA* [2014] EWHC 2211	To explain the application of ss. 53(2), 53(3), 53(4) and 54 of SGA 79	Assessment of damages under statute and common law

Key case	How to use	Related topics
Re R & H Hall & Co and W H Pim Jnr & Co Ltd's Arbitration [1927] 30 LI L Rep 159	To illustrate when damages can be claimed for loss of sub-sales	Remoteness of damage in common law

Key further reading

Key articles/reports	How to use	Related topics
Dobson, P. (2003) Sale of Goods – Loss of Right of Rejection – Acceptance, *Student Law Review* 40.	To ascertain when a buyer can be deemed to have accepted goods	Rescission, repudiation, acceptance and rejection
Briefing Paper Number SN6588 (1 Oct 2015) Consumer Rights Act 2015 by Lorraine Conway: *Consumer Rights Act 2015* – Parliament researchbriefings. files.parliament.uk/documents/SN06588/SN06588.pdf	To gain a summary of the key provisions of the CRA 2015 regarding consumer sales	Unfair contract terms, sale of digital content
Hedley, S. (2001) Sale of goods – Remedy of rejection – How quickly is the right lost? *The Cambridge Law Journal* 60(1), pp. 1–58.	To examine case law illustrating loss of right of rejection	Acceptance and non-acceptance. Repudiation of contract
Low, K. F. K. (2007) Repair, Rejection and Rescission: An Uneasy Resolution, 123 *Law Quarterly Review* 536.	To show how rights of rejection are affected after accepting a repair	Acceptance of goods

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6

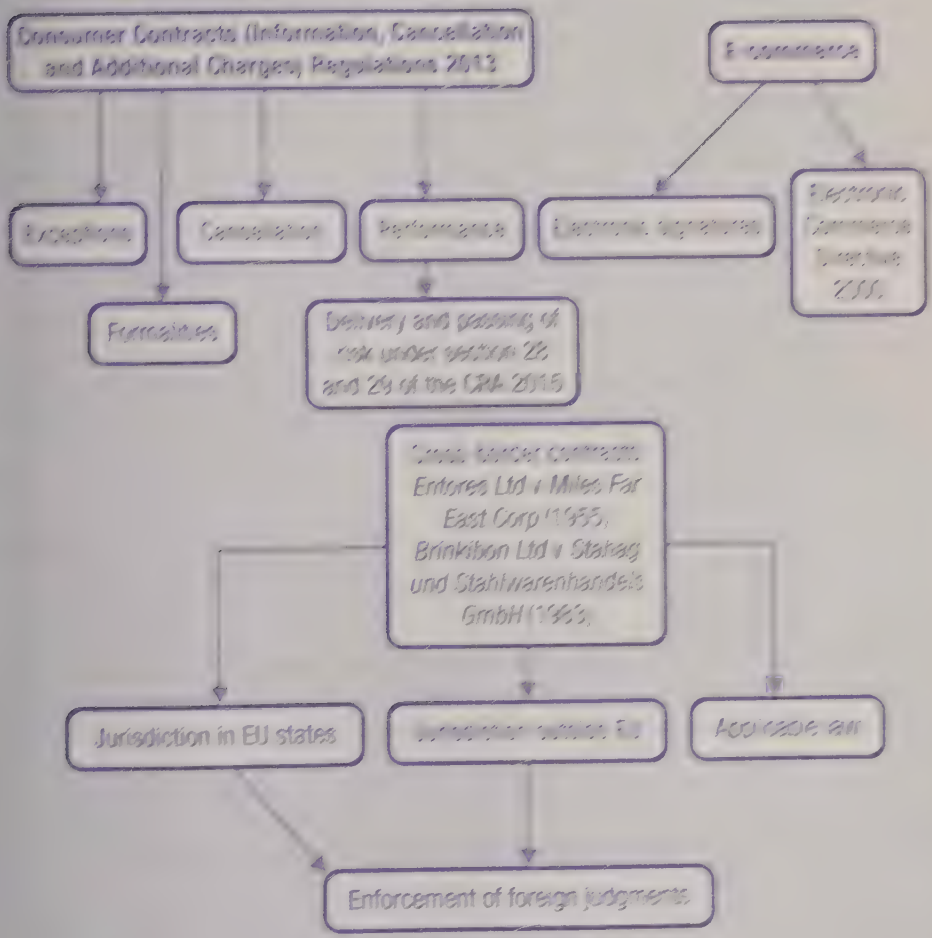
Distance selling and electronic commerce

Revision checklist

Essential points you should know:

- Scope of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CC(ICAC))
- How a contract is processed online
- Key provisions of Regulations regarding electronic communications and signatures
- Implications of making international contracts online

Topic map


Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
E-commerce
Cancellation
Performance
Delivery and passing of risk under section 28 and 29 of the CRA 2015
Formalities
Jurisdiction in EU states
Applicable law
Enforcement of foreign judgments

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Introduction

Exam questions increasingly call for an analysis of distance contracts, usually conducted over the internet.

You will have already encountered the problems caused by instantaneous communication in the formation of contracts, most notably those of choice of jurisdiction in international transactions. Special rules for withdrawal from contracts have also been addressed in the context of distance selling agreements. Because both distance selling and electronic contracts are concerned with a mode of contracting, you should be aware of the relevant applicable common law and regulatory regime. This chapter focuses on the key common law and statutory provisions that apply to distance and online selling.

Assessment advice

Essay questions

These tend to include a general statement that may or may not involve online trading. If the question is concerned with online sales, you should deal with distance selling as well as e-commerce. You will need to demonstrate a sound knowledge of the provisions of all relevant Regulations.

Problem questions

Problems tend to take the form of a scenario in which a customer enters into a **distance contract**, either online or by other means of communication. You will need to be aware of the subject matter of the deal to ensure that the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 apply. Also look out for possible face-to-face contact between customer and seller during the transaction. If the transaction involves cross-border issues, you will be required to demonstrate knowledge of the Brussels Regulation and the Contracts (Applicable Law) Act 1990.

Current legislation on distance selling

While examining the current provisions on distance selling, it is important to bear in mind that as most of the legislation on distance selling is derived from the EU, there remains some uncertainty as to any future changes that may be introduced after Brexit.

The aim of the Distance Selling Directive 97/7/EC was to give consumers – who make contracts without any face-to-face contact with the supplier – protection throughout the EU. To achieve consumer protection, the Directive addressed issues such as the provision of adequate pre-contractual information, cancellation rights,

inertia selling and fraudulent use of credit cards. The Directive was implemented into UK law by the Consumer Protection (Distance Selling) Regulations 2000 (CP(DS)), which were replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CC(ICAC)). These Regulations implemented aspects of the Consumer Rights Bill concerning doorstep, distance and inertia selling, as well as sale of digital content in order to apply a single set of rules for such contracts conducted within the EU. The 2013 Regulations effectively repealed the Consumer Protection (Distance Selling) Regulations 2000 and the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations SI 2008/1816.

The Unsolicited Goods and Services Act 1971 provides for inertia selling by making it an offence to supply goods or services to a consumer without consent, and as such an automatically unfair trade practice under the Consumer Protection from Unfair Trading Regulations 2008 (Sched. 1) (see Chapter 11).

Unsolicited Goods and Services Act 1971, s. 2

Section 2 states that any trade or business person who, without reasonable cause to believe he has a right to payment, demands payment for **unsolicited goods** (namely: unrequested goods sent to the offeree without their consent) sent to another person, shall be guilty of a summary offence and if found guilty can be fined up to £200.

Distance selling under the 2013 Regulations

With regard to distance selling, the 2013 Regulations retain many of the provisions of the Consumer Protection (Distance Selling) Regulations 2000 regarding definitions of parties and distance selling schemes, information requirements, formalities and exemptions. Under reg. 5 of the 2013 Regulations, a 'distance contract' is one that is between a *trader* (acting for commercial or professional purposes) and a *consumer* who is a natural person (acting for purposes that are mainly or wholly) outside his business or profession. It must concern goods or services and be conducted under an organised *distance sales or service scheme* run by a trader without the simultaneous physical presence of the trader or consumer. Finally the trader must make exclusive use of distance communications such as telephone, fax, television, letter, email, internet, up to and at the time the contract is made. Hence, for those contracts affected by the Regulations, clear detailed information about the product and supplier must be provided prior to the contract. This enables the consumer buyer to be well informed before they decide to make an offer. And because the Regulations do not state the point at which the contract is entered into – as this is for the common law and the parties' own terms to determine – many of these contracts are easily cancellable. It goes without saying that these sorts of agreements have a cooling-off period, during which a consumer can withdraw from the contract.

Exam tip

Look out for problem questions in which there is a series of distance communications in contract negotiations, but where the contract is made face to face. This will not qualify as 'distance selling', neither will a one-off telephone or online order made by a customer. Also, it is important to understand that the term 'organised sales or service scheme' refers to a bespoke scheme for distance selling, such as an established home delivery service, rather than a one-off event.

Limits of application of the 2013 Regulations

Contracts may fall within the definition given in reg. 5, but if they are among the categories listed in reg. 6, the provisions of the Regulations will not apply. Excepted contracts include:

- online gambling.
- sale or disposition of interests in land including rental (residential).
- sale or disposition of an interest in land (excluding rental).
- construction of a building where the sale of an interest in land is included.
- provision of financial services.
- contract entered into with automated vending machines or on automated commercial premises.
- auction sales.
- package holidays and travel.
- certain aspects of timeshares.
- contracts for one single connection for telephone, fax or internet by a consumer.
- contracts concluded through a public telephone with a telecommunications operator for use of the telephone.
- contracts for supply of groceries or other goods for current consumption on a regular basis to the home or workplace.
- the National Lottery.

Formalities required for distance contracts

The Regulations aim to ensure that consumers are given appropriate information and offered cancellation rights when making distance contracts during pre-contractual negotiations, before and during contractual performance. If any of these requirements are not followed, the contract is unenforceable.

According to reg. 7, some contracts are not subject to the above formalities, including contracts for:

- prescribed medicines.
- passenger transport services.

and

- those contracts conducted off premises where payment is less than £42.

Information requirements

All information requirements pertaining to contracts made on-premises, off-premises, by distance or electronic means, as well as contracts for repair and maintenance, are contained in Schedules 1 and 2. The information requirements for distance contracts are as follows:

Table 6.1 Information requirements for distance contracts

Stage of contractual formation	Information required to be given to consumer
Pre-contract (Schedule 2) (see also ss. 11(4)(5), 12(2), 36(3)(4), 37 and 50(3)(4) CRA 2015)	Supplier's identity and address if any advance payment is given
	Description of goods/services
	Price (inclusive of taxes), delivery costs and any costs of using distance communication
	The duration of any offer or price
	The minimum duration of an ongoing or recurrent contract
	Arrangements for payment, delivery and performance
	The existence of rights of cancellation
	Supplier's geographical business address for complaints as well as name, code or reference number
	After-sales service or guarantees
	Cancellation rights and methods including contracts of unspecified duration or exceeding one year.

Any information provided must be clear, comprehensible and appropriate with regard to the method of distance communication and given in a spirit of good faith by the supplier. Furthermore, information should be given to the consumer in durable form in good time either before or during the contract's performance.

Impress your examiner

It is worth pointing out to the examiner that the Consumer Rights Act 2015 has extended information requirements to include all information given pre-contract rather than information about the characteristics of goods or services (ss. 12(2), 37(2) and 50(3)). The consumer must agree to any changes made to any information provided, before or after the contract has been made (ss. 12(3), 37(3) and 50(4)).

Confirmation of distance contracts

The trader must confirm the contract with the consumer in durable form and within a reasonable time after the contract has been concluded and not after delivery or after a service has commenced (reg. 14(4)).

Impress your examiner

On the face of it, reg. 7 of the Consumer Protection (Distance Selling) Regulations 2000 appeared to be an effective provision as it insisted that information about the price and any surcharges a company made must be given to the consumer before a contract was concluded. Yet, travel companies continued to hide credit card surcharges by making consumers aware of them just before the contract was finalised, and only then after negotiating several webpages of form-filling and box-ticking. Regulation 14(2) of the CC(ICAC) Regulations 2013 now makes it obligatory for the trader to make the consumer aware of all costs before placing an order by ensuring that the consumer explicitly acknowledges that the order implies an obligation to pay (reg. 14 (3)).

Cancellation provisions

Any consumer who wishes to exercise rights of cancellation must send written notice to the supplier within the cancellation period (see Table 6.2).

Table 6.2 Exercising rights of cancellation

Nature of transaction	Expiry of period of notice for cancellation
Sale of goods (reg. 30(3))	14 days after delivery of goods: if there are several deliveries, then 14 days after the last delivery
Supply of services (reg. 30(2)(a)(b))	14 days after the contract for services or the supply of digital media was made
Sale of goods or supply of service where supplier has failed to give certain information in durable medium (reg. 31)	(a) In the first 12 months: beginning with the first of the 14 working days after the supplier provides durable information (reg. 31(2)) Or (b) If over 12 months: 14 days after the end of the 12 months (reg. 31(3)) Hence, if the supplier *never* complies with the requirement to give information in a durable form, (b) applies.

Once a consumer has exercised a right to cancel, payments made or goods given in part exchange can be recovered and the consumer must return goods to the supplier. Should the consumer's credit, debit or charge card be used fraudulently to pay for a distance contract, the consumer can cancel the payment.

Contract performance

Prior to the introduction of the CRA 2015, regulations 41 and 42 of the 2013 Regulations provided for delivery and the passing of risk respectively. Provisions under these regulations have now moved to ss. 28 (delivery) and 29 (the passing of risk) of the CRA 2015.

Delivery under s. 28 CRA 2015

So, once a distance contract has been made, in the absence of agreement to the contrary, the trader should deliver goods without undue delay and no more than 30 days after the contract has been entered into. If a supplier fails to deliver either within the 30-day period or according to a contractual agreement, then if the trader has refused to deliver the goods and either delivery is essential in the circumstances,

or the consumer has informed the trader prior to contracting that delivery is essential, the consumer may repudiate the contract and the trader must without delay reimburse all payments made under the contract. If a consumer does not exercise their right of repudiation, they can cancel all future orders or reject goods already delivered and the trader must reimburse all payments made without undue delay.

The passing of risk under s. 29 CRA 2015

The goods remain at the trader's risk until they come into the physical possession of the consumer, unless the consumer arranged for the goods to be transported by their own carrier, in which case the risk transfers to the consumer.

Exam tip

It is essential that you are able to show the examiner that you are aware of the changes to distance selling contracts instituted by the 2013 Regulations and are able to compare the CC(ICAC) Regulations with the CP(DS) Regulations 2000. You should be able to summarise and comment on the key areas of reform (see Table 6.3) so that you are able to point out the shortfalls of the 2000 Regulations in terms of consumer protection.

Table 6.3 Summary of the main reforms to cancellation rights in distance selling

	Consumer Protection (Distance Selling) Regulations 2000	**Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013**
Normal cancellation rights	7 working days after delivery of goods or making contract of service	14 calendar days from when goods received or service commences
Cancellation rights in absence of durable information	7 working days after seller supplies durable information Or If no durable information supplied, 3 months and 7 working days after delivery of goods or making of contract of service	If durable information supplied within a year, 14 calendar days after supply Or In absence of durable information, just over one year after the normal cancellation period expired

	Consumer Protection (Distance Selling) Regulations 2000	Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
	Consumer informed of right to cancel	Information of right to cancel and a model cancellation form must be provided by the supplier

Other changes

- Pre-ticked tick boxes for extras such as insurance are banned (reg. 40(2)).
- Telephone hotlines provided by seller cannot charge the premium rate (reg. 41(1)).
- A new category of digital content was introduced by both the 2013 Regulations and the Consumer Rights Act 2015 to allow for advances in technology and thereby avoid judicial and academic distortion of the definition of goods as given under s. 61(1) of the Sale of Goods Act 1979.
- When selling digital products such as software or online courses the seller must provide information about compatibility with hardware and IT systems (Sched. 2(w)).
- However, customers can only withdraw from purchases of digital products up until the moment the downloading process begins (reg. 37(2)).

E-commerce

Please note that the Electronic Commerce (Amendment etc.) (EU Exit) Regulations 2019 are currently being drafted to address anomalies arising under the Electronic Commerce (EC Directive) Regulations 2002 and the Electronic Commerce Directive (Miscellaneous Provisions) Regulations 2018 in the event of a 'no deal' EU exit. These Regulations will implement aspects of the e-commerce Directive into UK law.

The following legislation currently applies to electronic contracts:

- Electronic Communications Act 2000.
- Electronic Signatures Regulations 2002.
- Electronic Commerce (EC Directive) Regulations 2002.

Electronic signatures

The Electronic Signatures Directive 1999/93/EC was implemented into the UK by the Electronic Communications Act 2000 and the Electronic Signatures Regulations 2002 (see Table 6.4).

Table 6.4 Electronic signatures

Electronic Communications Act 2000	Electronic Signatures Regulations 2002
Provides for the legal recognition of electronic signatures	Introduces a statutory approved scheme to act as a quality mark for providers of cryptography services
Electronic signatures are admissible as evidence of authenticity and integrity (s. 7).	
Government ministers have the power to amend any legislation to authorise or facilitate the use of electronic communications and storage (s. 8).	

Exam tip

A good example of the use of s. 8 powers can be seen in credit where the Consumer Credit Act 1974 (Electronic Communications) Order 2004 allows use of electronic communication in the termination of consumer credit licences, the formulation of regulated agreements, guarantees and indemnities, cancellation notices and copies of documents.

Electronic Commerce Directive 2000

The Electronic Commerce Directive 2000 was implemented into the UK by the Electronic Commerce (EC Directive) Regulations 2002 which applies to all **service providers**. A broad definition of a service provider is given by reg. 2(1) to include:

> . . . any service normally provided for remuneration at a distance by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.

Don't be tempted to . . .

Don't assume that a service provider refers solely to the server. In fact, according to reg. 2(1), a service provider includes those who advertise or sell goods and services to customers (both business and consumers) online, as well as those who transmit or store electronic data or provide access to a communications network.

Information to be provided

While businesses who deal with each other can make their own arrangements about the provision of information, a business dealing with consumers must follow the requirements laid down by the Regulations. Hence, the service provider must give their name and geographical address as well as direct contact details. If the service provider belongs to an authorisation scheme, the customer must be directed to relevant codes of conduct that can be accessed electronically. Finally, details of a trade or other register and registration ID must be provided if relevant. The service provider must also provide the technical steps to follow to conclude the contract and state whether or not the final contract will be filed by the business and whether it will be accessible to the customer. If the service provider fails to comply with these requirements then the customer can claim damages under reg. 13.

Placing of an order

Where an order is placed, the service provider must:

- acknowledge receipt of the order quickly and electronically.
- provide the technical means to identify and correct input errors before finalising the order so that the customer can cancel.
- provide the customer with the languages offered for conclusion of the contract.

If terms and conditions apply, the service provider must make them available for storage or printing out.

Of course, if a contract is formed and concluded solely by email, the above requirements do not apply.

Cross-border contracts

When a contract is made between parties in different countries, issues of jurisdiction, applicable law and enforcement of judgments arise.

The current law on cross-border contracts

Jurisdiction in EU states

Choice of jurisdiction in the EU is governed by the Brussels Regime (2001 Brussels Regulation (applying to judgments given in proceedings started before 10 January 2015) and the Recast Brussels Regulation (applying to judgments made in proceedings instituted on or after 10 January 2015)). Usually, jurisdiction for contract lies with the country of the defendant's domicile. A natural person's domicile is the country where he lives or to which he is substantially connected. A company's domicile is where it was incorporated and has its registered office or some other branch, or where its central control and management is exercised. There are, of course, exceptions to this general rule (Table 6.5).

Jurisdiction where one of the parties is outside the EU

Where either the buyer or seller is domiciled outside the EU the Brussels Regulation will not apply. In such cases the English courts will only accept jurisdiction if:

- the contract was made in England.
- the contract was made by an agent based in England on behalf of a party, trading or living elsewhere.
- the relevant applicable law is English.
- the contract specified the High Court as choice of forum.

Table 6.5 Exceptions concerning cross-border contracts

Branch or agency	Consumer claims (art. 15): a consumer may	Country of performance
If a defendant company has a branch in the EU, it can be sued at that branch, even if the main company is in another state within the EU or even outside the EU	(a) if they buy goods or services from a supplier in another EU state, sue in the consumer's own state (b) if they buy goods from a website in another Member State, sue in his own country providing the website is available in the consumer's domicile (c) if they buy in response to an advertisement in another Member State can sue in his own country if that advertisement is also directed to his country	A claim in contract can be brought either in the country where the defendant is domiciled or in the country where the contract was due to be performed

***Entores Ltd* v *Miles Far East Corp* [1955] 2 QB 327**

Facts

The claimants were based in London and the defendants in The Netherlands. An acceptance of the claimants' counter offer was sent by telex machine from The Netherlands. The English company had to establish where the contract was formed.

Legal principle
The contract was formed in England, so the English court had jurisdiction. The rule concerning acceptances sent by instantaneous means is that the acceptance must arrive for it to be effective.

Analysis
It is interesting to note that the court used the English common law rules of contract as applicable law to determine jurisdiction.

In *Brinkibon Ltd* v *Stahag und Stahlwarenhandels GmbH* [1983] 2 AC 34 the House of Lords approved the above decision, extending the principle to all communications sent by electronic means.

***Brinkibon Ltd* v *Stahag und Stahlwarenhandels GmbH* [1983] 2 AC 34**

Facts
An English company wanted leave to sue an Austrian company for breach of contract. The question before the court was whether the contract had been made in London or Vienna. The acceptance of a counter offer had been telexed from London to Vienna.

Legal principle
The contract was formed in Vienna, so the English court did not have jurisdiction. This case would now be governed by the Brussels Regulations.

Analysis
It is important to ensure that there is a choice of jurisdiction as well as an applicable law clause in commercial contracts to avoid any dispute over appropriate forum and choice of law.

Applicable law

The Rome Convention, implemented into the UK by the Law of Contracts (Applicable Law) Act 1990, specifies that the law that applies to a contract is that chosen by the parties. The applicable law does not have to be the law of the country of jurisdiction. Where parties have failed to make a choice of law, then the applicable law will be the law of the country that has the closest connection to the contract. Usually, this will be the law of the country of the party who has to perform the contract. This means that the applicable law, in the absence of choice, will be that of the seller. The 1990 Act applies to contracts made before 17 December 2009. Contracts made after

17 December 2009 are governed by the new Rome 1 Regulation (EC) No. 593/2008, which harmonises the rules for contractual obligations.

Impress your examiner

Parties may try to choose a law to avoid the strict regulatory requirements of a country. This is pointless, because if litigation is conducted in a country with mandatory legislation but with a different applicable law, the mandatory provisions will apply. Hence, any case brought in England using a foreign applicable law could not avoid the provisions of the Consumer Rights Act 2015. For an interesting account of a cross-border judgment where an English mandatory provision was applied to Belgian applicable law using injunctive powers provided by Part 8 of the Enterprise Act 2002, see *Fair Trading*, Issue 43, March 2006, OFT.

Enforcement of a foreign judgment

Article 26 of the Brussels Convention provides that a judgment given in a contracting state shall be recognised in the other contracting states without any special procedure being required. The English court need not enquire into the jurisdiction of the EU Court; it must assume it had jurisdiction and enforce its judgment, although there is a right of appeal. The procedure is by simple registration and application to the High Court. As regards non-European judgments, these are subject to common law rules and enquiries by the English court into foreign jurisdiction.

Future cross border contracts

Applicable law

Currently choice of law as applicable law is governed by both the Rome I and II Regime and it is envisaged that post-Brexit this regime will be followed as 'retained EU law'.

Choice of jurisdiction

Procedural matters such as choice of jurisdiction and enforcement of judgments are currently subject to the Brussels Regime. With regard to the Brussels Regime, whether or not it will still apply post-Brexit will depend on the future relationship between the UK and the EU. If there is no withdrawal agreement then the draft Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 will apply, and for choice of jurisdiction, the UK will apply the current Brussels Regime rules where proceedings were commenced pre-Brexit and are still ongoing post-Brexit. For future cross-border disputes, the new Exit Regulations will repeal the Brussels Regulations and such

disputes will become subject to English common law. Hence the English court can accept jurisdiction, where proceedings can be served within the jurisdiction, even by a temporary resident, or a claimant has permission to serve proceedings outside the jurisdiction, unless the court deems it is not the appropriate forum for settlement of the dispute.

Enforcement of judgments

Regarding enforcement of judgments, given by a Member State pre-Brexit, the UK courts will apply the current rules of the Brussels Regime. Where a Member State judgment is given post-Brexit, the UK will apply the English common law to enable a claimant to take a fresh action in debt as an enforcement of a money judgment only and where the foreign court had jurisdiction on limited grounds.

Rules for consumers post-Brexit

The Recast Brussels Regulation rules relating to jurisdiction for consumers will be retained for cases brought by and against UK domiciled consumers – so a consumer can bring proceedings where he/she is domiciled, or in the part of the UK where the supplier is domiciled, but can only be sued in the place of his/her domicile.

Putting it all together

Sample question

Could you answer this question? Below is a typical essay question that could arise on this topic. Additionally, a sample problem question and guidance on tackling it can be found on the companion website.

Essay question

How does the law provide protection for those who wish to buy products online?

Answer guidelines

Approaching the question

You should initially define an online contract as a distance contract which is currently subject to the CC(ICAC) Regulations 2013 as well as the Electronic Commerce (EC Directive) Regulations 2002.

Important points to include

Deal with each Regulation by analysing key definitions such as 'distance sale' and 'service provider'.

You need to point out that the CC(ICAC) Regulations 2013 apply to consumers only and the Electronic Commerce (EC Directive) Regulations 2002 apply to both businesses and consumers.

Give an outline of the protective measures given to customers (consumers and/or businesses) including information requirements, rights of cancellation, rules for contractual performance and online procedures.

Because of the development of international markets via the internet, you should include choice of jurisdiction, applicable law and enforcement of judgments.

When dealing with the above issues you will need to apply key provisions of the relevant Regulations.

Impress your examiner

The question requires an assessment of the degree of protection offered to those entering into distance contracts, so you should include areas where protection is lacking, for example the exceptions and exemptions in distance selling.

Additionally you should point out that while the Electronic Commerce (EC Directive) Regulations 2002 do not apply to contracts conducted by email, such contracts, if business to consumer, would be subject to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. With regard to cross-border contracts, highlight the greater protection given to EU members trading within the EU and highlight the special protection offered to consumers by the Brussels Regulation, art. 15.

Key case summary

Key case	How to use	Related topics
Entores Ltd v *Miles Far East Corp* [1955] 2 QB 327	To explain the rules of communication of acceptance by electronic means	Formation of contract
Brinkibon Ltd v *Stahag und Stahlwarenhandels GmbH* [1983] 2 AC 34	To illustrate choice of jurisdiction in electronic contracts	Formation of contract

Key further reading

Key articles/reports	How to use	Related topics
Conway, L. (2017) *Distance selling: sale of consumer goods over the internet or telephone etc.* Briefing paper No CPB5761, 16 May 2017. https://www.researchbriefings.files.parliament.uk	To gain a summary of provisions of Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 and Consumer Rights Act 2015 on distance sales	Digital sales, unfair trading practices, unfair contract terms
Justice Committee. *Brexit and civil, commercial and consumer law: Written submission from the Competition and Markets Authority* to the House of Lords Justice Sub-committee, 12 Sept 2017. https://www.parliament.scot/S5_JusticeCommittee/Inquiries/Brexit-CMA.pdf	To obtain information on cross-border enforcement, digital trade including car hire, gambling, and secondary ticket selling	Unfair trading practices, regulation, vulnerable consumers
Ministry of Justice. Cross-border civil and commercial legal cases after Brexit: Guidance for legal professionals. www.gov.uk	To gain an understanding of the current law on choice of jurisdiction, applicable law and enforcement of judgments, and the proposed changes post-Brexit	Digital sales
Youngerwood, A. and Mann, S. (2000) Extra Armoury for Consumers: The New Distance Selling Regulations, *Journal of Information Law and Technology* 3.	To understand the provisions of the 2000 Distance Selling Regulations and identify the overlap with the Electronic Commerce Directive	Consumer credit, cancellation rights

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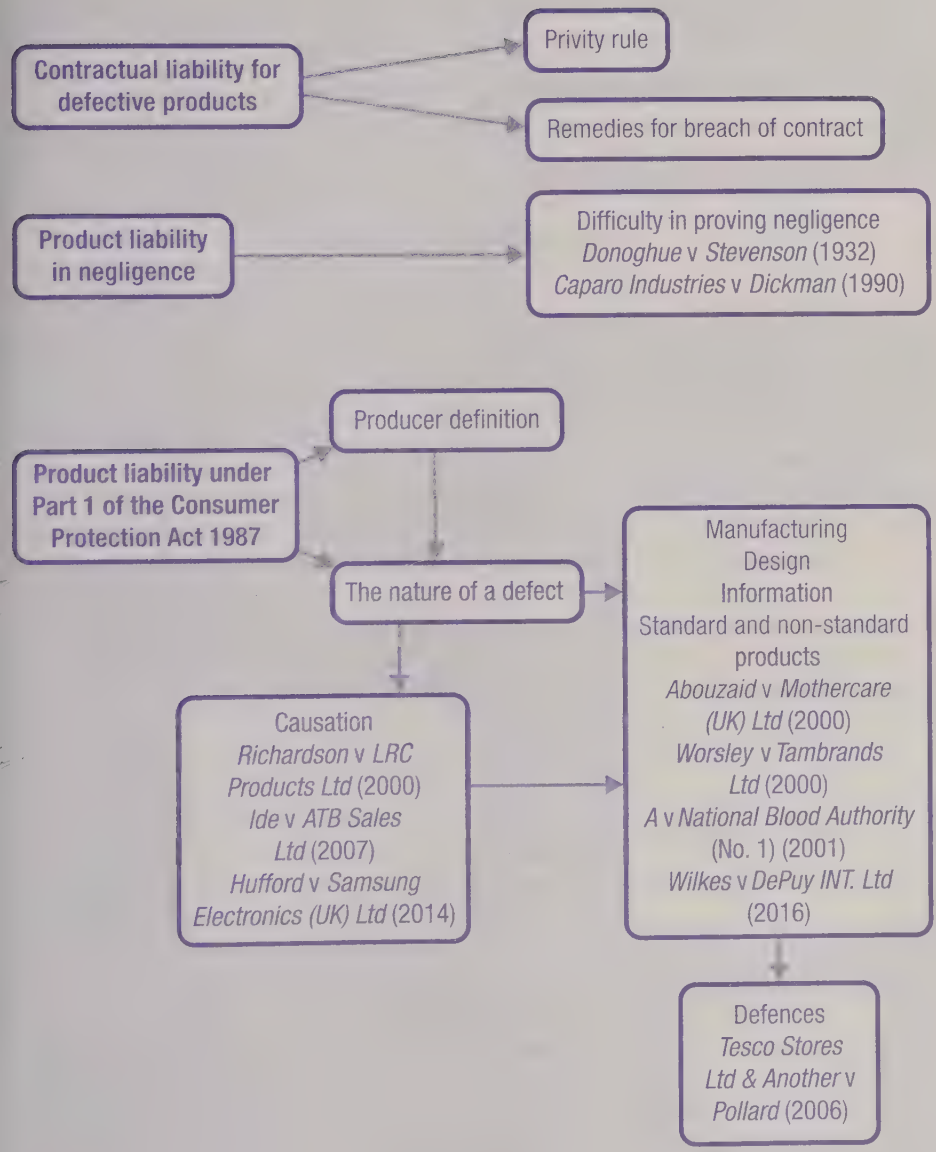
Product liability

Revision checklist

Essential points you should know:

- Consumer protection under contract
- Consumer protection under the law of negligence
- Consumer protection under the Consumer Protection Act 1987 (CPA)
- Rationale for consumer protection under the Consumer Protection Act 1987
- Limitations on protection given by contract, negligence and the Act

Topic map


Contractual liability for defective products
Privity rule
Remedies for breach of contract
Product liability in negligence
Difficulty in proving negligence
Donoghue v *Stevenson* (1932)
Caparo Industries v *Dickman* (1990)
Product liability under Part 1 of the Consumer Protection Act 1987
Producer definition
The nature of a defect
Manufacturing
Design
Information
Standard and non-standard products
Abouzaid v *Mothercare (UK) Ltd* (2000)
Worsley v *Tambrands Ltd* (2000)
A v *National Blood Authority* (No. 1) (2001)
Wilkes v *DePuy INT. Ltd* (2016)
Causation
Richardson v *LRC Products Ltd* (2000)
Ide v *ATB Sales Ltd* (2007)
Hufford v *Samsung Electronics (UK) Ltd* (2014)
Defences
Tesco Stores Ltd & Another v *Pollard* (2006)

A printable version of this topic map is available from **go.pearson.com/uk/lawexpress**

Introduction

The following chapter deals with product liability and its ramifications under the law of contract and negligence, as well as in the Consumer Protection Act 1987.

As a topic in problem questions, assignments and exams, you are expected to demonstrate an awareness and understanding of the different heads of liability and remedies given under each category.

Assessment advice

Essay questions

Should this topic appear in essay form, you will be expected to compare and contrast the three areas of liability and be able to provide a critical analysis of the advantages and disadvantages of taking actions under each.

Problem questions

A problem question will almost certainly focus on several characters who suffer differing degrees of personal injury and/or property damage resulting from a defective product. One will be in a contractual relationship with a retailer who is selling the product on behalf of the producer. The other characters will be victims of 'collateral damage' seemingly caused by the defective product. You will be expected to advise each individual on who is liable for what damage and the nature of the heads of damage that can be claimed.

Product liability

Consumer protection from defective products is provided under the law of contract, negligence and by the Consumer Protection Act 1987, Part 1.

Contractual protection for consumers

A consumer who suffers loss caused by a defective product can sue for breach of contract terms. Terms can be either expressed (spoken/written) or implied. The most important type of implied terms are those referred to by statute. For instance, the Sale of Goods Act 1979 implies certain key terms into all contracts for the sale of goods. These terms (ss. 12–15) cannot be excluded or restricted in any consumer transaction.

Exam tip

Read the question carefully. Does it ask for all liability or just liability under the Consumer Protection Act 1987? Where there are several individuals who need to be advised, do not spend too much time on contractual liability at the expense of the other areas of liability.

Similar protection for goods which are transferred as part of a contract of hire or for a service is given to consumers by means of ss. 2–5, Part 1 of the Supply of Goods and Services Act 1982.

What if a consumer is not a party to a contract?

Consumers who suffer loss caused by someone not in a contractual relationship with them have had to resort to several devices in order to obtain a remedy. This is because the principle of **privity of contract** only allows a person who is party to a contract to enforce rights under that contract. But there are legitimate ways to avoid this principle, such as when one acts as an agent of the buyer, or where the courts construe a collateral agreement.

***Shanklin Pier Ltd* v *Detel Products Ltd* [1951] 2 KB 854**

Facts
The plaintiffs entered into a contract with a contractor to repair their pier and insisted that the defendants' paint be used. The defendants' representative had stated that their paint would last for seven to ten years. But the paint soon deteriorated and the plaintiffs, having to have the pier repainted at extra cost, claimed breach of warranty on the part of the defendants.

Legal principle
There was a collateral contract between the plaintiffs and the defendants because the plaintiffs had shown consideration in stipulating that the defendants' paint had to be used in their joint contract.

Analysis
As Lord Moulton stated in *Heilbut Symons & Co* v *Buckleton* [1913] AC 30 at p. 47: '. . . there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds", is in every sense of the word a complete legal contract. It is collateral to the main contract . . . But such collateral contracts must from their very nature be rare.' The collateral agreement in this case acted as a form of guarantee for the quality of the paint.

Don't be tempted to . . .

Don't assume that guarantees given by retailers and manufacturers override statute. These have been described as worthless. While guarantees can be enforced by those who are not party to a contract, they may be subject to terms whereby the consumer has to pay a proportionate price for transporting the goods to the repairer.

The Contracts (Rights of Third Parties) Act 1999 (C(RTP)A) has at least gone some way towards alleviating the burden of the privity rule, but to enforce such rights, a third party has to be identified or be identifiable as a beneficiary to a contract. Of course, the Act is unlikely to have any impact on consumers.

Contracts (Rights of Third Parties) Act 1999, s. 1

(1) Subject to the provisions of this Act, a person who is not party to a contract (a 'third party') may in his own right enforce a term of the contract if:

(a) The contract expressly provides that he may, or

(b) Subject to s. 1(2) the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description, but need not be in existence when the contract is entered into.

Remedies for breach of contract

Where a contract is breached owing to a defective product, a consumer will want compensation for the loss. The consumer may claim the value of the product and any losses resulting from the breach as long as they are not too remote.

Exam tip

The rule of remoteness of damage is crucial to expectation loss and should be highlighted in questions of product liability within a contractual relationship.

Product liability in negligence

Should a consumer suffer loss in a non-contractual relationship, then they could resort to the law of tort by using negligence as a basis for compensation for loss. It should be noted that while obligations in contract are freely undertaken by the parties, obligations in negligence are imposed on the parties by the court. Negligence is based on fault, the principles of which were laid down in *Donoghue* v *Stevenson* [1932] AC 562.

Donoghue v *Stevenson* [1932] AC 562

Facts

Two friends visited a café in Paisley, Scotland, one of whom bought a bottle of ginger beer for her friend, Miss Donoghue. On drinking the beer, Miss D noticed a decomposed snail in the bottle, following which she suffered food poisoning, but was unable to sue the café owner, Mr Minchella, because she had not purchased the product. Instead, she sued the manufacturer, Stevenson, for breaching a duty of care owed to the end user of their product.

Legal principle

One must take reasonable care to avoid acts or omissions that could reasonably be foreseen as likely to injure one's neighbour; hence manufacturers owe a duty of care to their customers to ensure that they are not harmed by their product.

Analysis

The neighbour principle established by Lord Atkin in this case established the law of negligence and imposed a duty of care on manufacturers to take reasonable steps to ensure that their products do not harm foreseeable ultimate consumers.

Exam tip

The onus of proving fault involves showing: (i) a duty of care owed; (ii) breach of duty and (iii) foreseeable damage caused lies entirely on the claimant and can be difficult to prove. Additionally, there must be no intervening event in the chain of causation. So when the liability of a manufacturer is an issue, the manufacturer will only be liable when the goods reach the ultimate consumer in the same state as they left the manufacturer.

The difficulty of proving negligence

In establishing negligence the courts will look at the relationship between the parties, the risk involved and public interest factors. There is no simple formula and the law of negligence has developed incrementally to determine the extent of liability.

Caparo Industries v *Dickman* [1990] 1 All ER 568

Facts

The claimants owned shares in Fidelity. They made a successful takeover of Fidelity based on the defendant auditor's report. The accounts showed a profit of £1.2m and the claimants alleged they should have shown a loss of £0.4m. The claimants sued the defendants for breach of a duty of care.

Legal principle

There was no duty of care owed to the claimants by the auditors because whether a duty of care is owed depends on: foreseeability of loss; proximity of relationship; and whether or not it is reasonable to impose such a duty.

Analysis

By this decision it was held that not only did the auditors not owe a duty of care to the public, they did not owe a duty to individual members of the company (relying on a general statement) who wished to buy more shares.

Negligence is difficult to prove because once past the *Caparo* test, the claimant has to show that the duty of care was breached. The final hurdle is presented by a limitation in the damages claimable because of issues such as causation (including multiple causes), remoteness of damage and, finally, by the nature of the damage itself. For instance, claims for economic loss are normally not recoverable unless linked with physical loss or resulting from negligent misstatement.

The need for the Consumer Protection Act 1987, Part I

We have identified the shortcomings of the law of contract and negligence as a way of enforcing consumer rights and seeking a suitable remedy. The Consumer Protection Act 1987 was introduced as a result of the EC Product Liability Directive 85/374/EEC to give consumers better protection against **damage** caused by defective products. Previously, consumers who were non-buyers had to resort to the law of negligence to pursue their rights, and buyers who were consumers were often left with no remedy at all should the seller cease trading. The Act allows consumers who suffer loss as a result of a defective product to take action against the producer under what was perceived as a regime of strict liability.

Consumer Protection Act 1987, Part 1, s. 2(1)

. . . where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) . . . applies shall be liable for the damage.

Producer is defined widely in s. 1(2) of the Act in relation to the product as 'the manufacturer, the abstractor, or processor, who by means of an industrial process changes the essential characteristics of a product'. **Product** is defined as 'any goods or electricity' including 'a product which is comprised in another product as a component or raw material'. Section 2(2) goes on to extend liability to a range of producers.

Section 2(2) of the Act defines the categories of people who can be held liable under s. 2(1) as:

- a producer of the product.
- an own-brander.
- a business importer of goods from outside the EU.
- anyone subjecting agricultural produce to an industrial process.
- anyone extracting raw materials.

It is interesting to note that an industrial process on agricultural produce could include the application of insecticide, fungicide and fertiliser as part of the production process were it to change the 'essential characteristics' of the product.

Section 2(3) goes on to add that suppliers may find themselves liable if within a reasonable time they do not identify any of the people listed in s. 2(2) as a source of their product.

Exam tip

It is a good idea to show the examiner that you appreciate the rationale behind the Act and the justification for imposing such a high level of liability on the producer.

The nature of product liability

At first sight the liability outlined in s. 2(1) appears to have a simple outcome. It assumes that because liability is strictly interpreted, a producer will be liable for damage caused by defects in their product. However, it is not always easy to prove that there is a defect in a product, and even if there is, that it caused the damage. As a result, art. 4 of the Product Liability Directive places the burden onto the claimant to prove that a defect caused any resultant damage.

Consumer Protection Act 1987, Part 1, s. 3(1)

. . . there is a defect in a product . . . if the safety of the product is not such as persons generally are entitled to expect.

What are persons 'entitled to expect'? (s. 3(2))

All circumstances should be taken into account including:

- how and why the product was marketed.
- the use of warning marks, instructions about use of the product.
- reasonable expectations of product use.
- time of supply by one producer to another.

Impress your examiner

It seems that the above definition in s. 3(2) provides the producer with an excuse for what may appear at first sight to be a defective product. Take as an example a beneficial pharmaceutical product with certain damaging side-effects. It could be argued that the safety risks are outweighed by the inherent benefit the product has. In cases like this, the assessment of risk versus benefits involves a 'cost–benefit analysis' approach by the courts.

The nature of a defect

The definition given in s. 3 neither outlines a standard model, nor specifies the exact nature of a defect. In fact, subsequent case law has identified various kinds of defect as being the result of manufacturing, design and information failures.

Manufacturing defects

Manufacturing defects will tend to be one-off defects and the result of poor quality control. In such cases, expert evidence becomes a key factor and the judge, who does not have the technical expertise, has to weigh up conflicting evidence and decide which is sound and reliable.

Richardson v *LRC Products Ltd* [2000] PIQR P164 (QBD)

Facts

The claimant became pregnant due to a defective condom. She kept the used condom in a jar in her bathroom cabinet as evidence.

Legal principle

The claimant failed to show that the defect had been caused by the producer. It could have been caused by exposure to ozone after use or during storage.

Analysis
It is useful to note the comments made by Kennedy J, who distinguished between the user's subjective expectations and the objective legal test: 'Naturally enough the users' expectation is that the condom will not fail. There is no claim by the defendants that one will never fail and no-one has ever supposed that any method of contraception intended to defeat nature will be one hundred percent effective.'

Design defect

Design defects can have serious implications because they could produce a whole range of defective products.

Abouzaid v *Mothercare (UK) Ltd* [2000] EWCA Civ 348

Facts
A 12-year-old claimant was helping his mother attach a sleeping bag to his brother's pushchair when a buckle on one of the elastic straps slipped from his grasp and hit him in the eye, causing him a partially detached retina.

Legal principle
It was proved that due to a design fault the defendants' product had failed to meet the safety standards the public were entitled to expect.

Analysis
The court found that although the appellants had not been negligent, the product was defective within the meaning of the Act. As Pill LJ stated: 'The product was defective because it was supplied with a design which permitted the risk to arise and without giving a warning that the user should not so position himself that the risk arose.' The seriousness of the potential risk in this case was a deciding factor in the decision: 'Members of the public were entitled to expect better from the appellants. A factor in that expectation is the vulnerability of the eye . . . Expectations would be different if the worst which could occur was an impact of elastic on the hand.' (Pill LJ)

Information defect

Warnings are necessary when the danger exceeds what the user might reasonably expect. Just as not every aspect of a product may be known, so there is no need to warn the public about every possible danger of a product's use. Only warnings about inherently dangerous products, like that of bleach, need to be given, as well as products that, if not used properly, might become dangerous.

***Worsley* v *Tambrands Ltd* [2000] PIQR P95 (QBD)**

Facts
The claimant suffered toxic shock syndrome which she alleged was caused by a tampon manufactured by the defendant.

Legal principle
Having detailed a warning on a leaflet inside the content's box, it was found that the producer had conveyed all necessary and relevant information a user needed to know about the product's use.

Analysis
According to Ebsworth J the defendants had done all necessary to alert the claimant to possible risks and thus fulfilled her expectation entitlement. They had a clearly legible warning on the outside of the box directing the user to a leaflet inside the box. The leaflet was legible and unambiguous and comprehensive as to warning signs of potential injury. The defendants could not be expected to cater for situations where the user had lost the leaflet and not sought to replace it.

Standard products and non-standard products

In *A* v *National Blood Authority (No. 1)* [2001] 3 All ER 289 (see below), Burton J did not favour the traditional categorisation of defects into manufacturing, design and information defects. He preferred to distinguish between *standard and non-standard* products. Burton J suggested that a non-standard product is one which is deficient or inferior in terms of safety from the standard product and it is this deviation from the standard product that caused the injury. This categorisation goes beyond manufacturing, design or information defects because it covers rogue products which result from the nature of the producer's process. The emphasis on liability also appears to shift from defect to causation.

***A* v *National Blood Authority (No. 1)* [2001] 3 All ER 289**

Facts
Over 100 claimants who had been infected with hepatitis C after receiving infected blood transfusions instigated a class action against the National Blood Authority (NBA). The Authority claimed they had taken all reasonable precautions in view of the fact that, at the time, they did not have the technology to screen blood for the virus.

Legal principle
Finding in favour of the claimants, Burton J held that taking reasonable care was not relevant, as the public were entitled to expect that blood transfusions would be free from infection, even if the risk was unavoidable. The court was concerned with questions of defectiveness, not negligence.

Analysis
This case has been found by many academic authorities to be unfair on the medical profession as the decision was based on a subjective expectation of the general public that all blood products would be free from contamination even if there is no known test to detect it. The fact that the NBA was aware of a possible risk was enough to make the development risks defence unavailable.

Exam tip

Show how the emergence of a form of strict liability came about in the hepatitis case. The judge did not apply the cost–benefit approach, but assessed the benefits against the risk instead, and in so doing placed the claimants in a win/win position.

The decision in *A* v *National Blood Authority* was subject to much academic criticism yet was not challenged until the following case.

Wilkes v *DePuy International Ltd* [2016] EWHC 3096 (QB)

Facts
Three years after receiving a hip replacement, the claimant suffered a fracture in a stainless steel femoral component of the prosthesis, which he claimed was defective and thereby didn't meet the safety requirements 'that persons generally are entitled to expect' from such medical procedural devices. However, the defendant denied there was any defect and in any case the law does at least allow for the risk of a 'warned adverse event' in the manufacture of beneficial products. Additionally, the defendants had undertaken testing of the component in compliance with British Standards.

Legal principle
In concluding that the prosthesis was not defective according to s. 3(1) of the CPA 1987 Hickinbottom J stated that a risk of damage doesn't of itself make ▶

a product defective. Some degree of product risk is deemed to be acceptable viewed against its beneficial effects. The principle of 'fair apportionment of risk' laid out in the Product Liability Directive does not relieve the consumer of the burden of expecting some risk in using a product.

Analysis
The decision in this case departs from that given in *A* v *National Blood Authority* [2001] 3 All ER 289 by refining the approach to interpretation of a defect under s. 3 of the CPA 1987 and the circumstances to be taken into effect when ascertaining what the public is entitled to expect.

Impress your examiner

Hickinbottom J's decision to use the cost–benefit analysis approach in assessing whether or not a defect in a product falls within the definition provided by s. 3(1) and (2) of the CPA 1987 creates a significant persuasive precedent for future cases of product liability.

Causation

The consumer must prove on the balance of probabilities that the defect in the product caused the damage.

Impress your examiner

It is also clear from s. 2(1) CPA 1987 that the consumer must prove on the balance of probabilities that damage was caused by a defect in the product. The case law has shown that this has proved problematic: see *Richardson* v *LRC Products Ltd* [2000] PIQR P164. Issues of causation are also affected by the defence of contributory negligence, as well as being conditional on a definition of defect from the aspect of 'reasonable expectation entitlement'. Thus, in *Richardson* v *LRC Products Ltd*, Kennedy J indicated that although users did not expect condoms to fail, they were not entitled to such an expectation.

Yet recent decisions have indicated that the courts are willing to relieve the consumer to some extent from the burden of proving causation, as the following cases illustrate.

Ide v *ATB Sales Ltd* [2007] EWHC 1667 (QB)

Facts
The claimant suffered significant brain damage when the handlebar on his mountain bike fractured and injured his head. The defendants argued that the product was not defective, rather that the claimant lost control of the bike which resulted in the fracture of the handlebar.

Legal principle
The court held that despite being manufactured to British standards the handlebar was defective within the meaning of s. 3(1). It was not up to the claimant to show *how* the defect had occurred.

Analysis
It is interesting to note that Thomas LJ accepted the evidence put forward by the expert witness of the claimant rather than that proposed by the defendant's expert. In doing so he decided that the theory put forward by the defendant was the least likely cause of the fracture.

Hufford v *Samsung Electronics* [2014] EWHC 2956 (TCC)

Facts
The claimant's kitchen was destroyed after a fridge caught fire. He alleged that the fire originated inside the appliance. This was contested by the defendant, who claimed the fire was caused by the ignition of combustible material next to the fridge.

Legal principle
The claimant failed in his claim, referring to *Ide* v *ATB Sales Ltd* (2000) 59 BMLR 178 in which Grant J stated that the claimant didn't have to specify the exact nature of the defect in the product; however in this case, expert evidence pointed to the fact that the fire wasn't caused by the fridge at all, but by material left around it.

Analysis
This case illustrates the importance of producing irrefutable expert evidence in order to prove causation.

Exam tip

If Mr Hufford had been able to show causation it would have been much easier to establish the existence of a defect, as there was no legal requirement for him to point to a *specific* defect in the product or how that defect arose; unlike the decision in *Richardson* v *LRC Products* [2000] where the exact nature of the defect had to be proved to establish causation. Richardson has been criticised for imposing upon the claimant a burden of proof of causation similar to that required for negligence.

Defences

The defences are given in s. 4 CPA 1987, the most controversial being the 'development risks defence', because if a product is still on trial and a defect is not discoverable at the time it is put into circulation, then the defendant will not be liable for damage caused by its defects. Nevertheless, once a risk becomes known then the defence will not apply, even if the risk is unavoidable. Contributory negligence is provided as a defence according to s. 6(4).

Consumer Protection Act 1987, Part 1, s. 4(1)(a)–(f)

(a) The defect is attributable to compliance with domestic or EC legislation.

(b) The defendant did not supply the product.

(c) The product was not manufactured or supplied in the course of a business.

(d) The defect did not exist at the time the product was put into circulation.

(e) The 'development risks' defence: at the time of manufacture, the state of scientific/technical knowledge was not such that a producer might be expected to discover the defect.

(f) A supplier of a component will have a defence if the defect was caused by the way it was designed to fit into the manufacturer's product.

Defence of regulatory compliance

There have been recent attempts by defendants to put forward a defence of regulatory compliance. The decision in the case outlined below indicates that regulatory compliance will be a factor for the court to take into account when assessing the safety of a product rather than a full defence to the question of whether that product satisfies the test for defectiveness in s. 3(1).

***Tesco Stores Ltd & Another* v *Pollard* [2006] EWCA CIV 393**

Facts

The claimant, aged 13 months, became very ill after ingesting dishwasher powder from a bottle of Tesco Own Brand dishwasher. The case against Tesco was that the cap was defective so it was easier to detach than it should have been. It was argued for the claimant that the public were entitled to expect that the product in this case complied with the British Standard measure. The defendant claimed that the boy's mother had left the bottle within reaching distance of the child and had left the cap insecurely fastened. At trial the judge found in favour of the claimant. The defendant appealed.

Legal principle

The appeal was upheld because the cap was more difficult to remove than that of an ordinary product, so no defect was established under the CPA 1987.

Analysis

It is interesting to note that the judge held that compliance with national standards was irrelevant to whether or not a cap on a bottle of detergent was hard to remove. Buyers would be unaware of what the national standard of safety was; all they would be concerned about was whether or not the cap was easy to remove. Although the bottle was easier to open than it should have been, it still had some child resistant effect.

Limitation of action

Any action must be brought within three years from the date the damage was caused (or three years from when the damage could reasonably have been discovered), but not more than ten years after the product was brought into circulation.

Putting it all together

Sample question

Could you answer this question? Below is a typical problem question that could arise on this topic. Additionally, a sample essay question and guidance on tackling it can be found on the companion website.

Problem question

Asif is an entrepreneur who owns a large mansion with several acres of land. He often invites his business associates to garden parties. His event organiser, Mona, suggested that he should have a hot air balloon advertising his corporate image at his next party.

Asif agreed, so Mona contacted Gas & Air Fun Fair Ltd (GAFF) and asked them to provide a hot air balloon with Asif's logo printed on it.

Asif invited all of his business associates and their families to celebrate 20 years of his company's successful trading. During the party, Ed, an actor, started climbing up the basket's anchor ropes as the balloon ascended. All at once, the valve on the 'burner' jammed and the balloon suddenly plummeted 30 metres or so onto a greenhouse below, damaging several prize orchids, and injuring Babe, a supermodel, who was cut by flying glass.

Both Ed and Babe were taken to hospital. Ed had suffered a broken arm and cannot take up his next film role, while Babe needs plastic surgery to her face that threatens her career as a supermodel.

GAFF refused to accept responsibility. In their view, the hot air balloon had a defect in one of its oxygen canisters, and the injured parties should take up their complaint with the manufacturer, Balloon Air Display Ltd (BAD).

Advise Asif, Ed and Babe as to the suppliers' liability and possible remedies.

Answer guidelines

Approaching the question

Structure your answer logically, dealing with each party in turn. First, deal with sale of goods liability of GAFF to Asif. Then deal with negligence and product liability to third parties, Ed and Babe, cross-referencing when liability overlaps but applying relevant principles to relevant losses. Don't forget to compare the remedies under each head of liability and reach a balanced, well-argued conclusion.

Important points to include

The following issues are raised:

- Liability of GAFF as supplier under the Sale of Goods Act 1979: breach of implied term of satisfactory quality and remedies/remoteness of damage.
- Liability of GAFF to identifiable third parties.
- Liability of GAFF in negligence.
- Liability of GAFF under relevant sections of the Consumer Protection Act 1987.
- Comparison of measure of damages under each head of liability.

With regard to sale of goods liability to Asif, show that you understand the privity rule by pointing out that only Asif has a claim for faulty goods. Point out that there has been a breach of the implied condition of satisfactory quality under s. 14(2) and fitness for purpose under s. 14(3) SGA 1979. Use relevant authority to support your argument. It is a good idea to deal with remedies for Asif at this point, outlining that he can claim consequential loss subject to the principles of remoteness of damage, viz. the greenhouse and orchids. When considering GAFF's liability to Ed and Babe, mention the privity rule but point out that Ed and Babe may be identifiable third parties under C(RTP)A 1999. Then consider negligence liability before analysing key provisions of CPA 1987, Part I. You will need to identify and explain relevant sections concerning GAFF as producer, the defect in the hot air balloon (causal link to damage) and defences for GAFF. Heads of damage for negligence should be distinguished from those awarded under CPA 1987.

Impress your examiner

Show your understanding by distinguishing between the heads of liability under contract, negligence and the Consumer Protection Act 1987. Also, by focusing on analysis of defect, you will be able to show your understanding of how problematic and contentious s. 3 CPA 1987 has proved to be in leading cases. Use the case law to identify and explain the difference between design, manufacturing defects and standard and non-standard products. By analysing the requirements for proof of liability under sale of goods, negligence and the Consumer Protection Act 1987 and comparing the different qualification and quantification of damages, you will be in a good position to provide relevant, practical advice as a conclusion.

Key case summary

Key case	How to use	Related topics
Shanklin Pier Ltd v *Detel Products Ltd* [1951] 2 KB 854	To explain the concept of collateral agreements	Breach of warranty
Donoghue v *Stevenson* [1932] AC 562	To explain the principles of fault-based liability	Sections 2, 3 and 4 CPA 1987
Caparo Industries v *Dickman* [1990] 1 All ER 568	To examine the extent of a duty of care	Fault-based liability

Key case	How to use	Related topics
Richardson v *LRC Products Ltd* [2000] PIQR P164 (QBD)	To give an example of the importance of proving causation when establishing a manufacturing defect	Expectation entitlement Pt 1, s. 3(1) CPA 1987 Satisfactory quality s. 14(2A), (2B)(e) SGA 1979; s. 9(1) (3) (a), (e) CRA 2015 GPS Regulations 2005, reg. 5
Abouzaid v *Mothercare (UK) Ltd* [2000] EWCA Civ 348	To explain how the courts interpret a design defect	Expectation entitlement Pt 1, s. 3(1) CPA 1987 Satisfactory quality s. 14(2A), (2B)(d) SGA 1979; s. 9(1) (3) (a), (e) CRA 2015 Section 11 CPA 1987, Pt II GPS Regulations 2005, reg. 5
Worsley v *Tambrands Ltd* [2000] PIQR P95 (QBD)	To demonstrate what is required to prove an information defect	Warnings under sale of goods, e.g. *Wormell* v *RHM Agriculture (East) Ltd* [1987] 1 WLR 1091
A v *National Blood Authority (No. 1)* [2001] 3 All ER 289	To critically examine the concept of standard and non-standard products given in Burton J's judgment	Expectation entitlement Pt 1, s. 3(1) CPA 1987 Defences under s. 4(1)(e) CPA 1987
Wilkes v *De Puy International Limited* [2016] EWHC 3096 (QB)	To determine fair apportionment	Expectation entitlement Pt 1 s. 3(1) CPA 1987; Satisfactory quality s. 14(2A), (2B)(d) SGA 1979; s. 9(1) (3) (a), (e) CRA 2015
Ide v *ATB Sales Ltd* [2007] EWHC 1667 (QB)	To illustrate the role of causation in proof of a defect	Fault-based liability under the *Caparo* test
Hufford v *Samsung Electronics (UK) Ltd* [2014] EWHC 2956 (TCC)	To clarify that there is no need to prove the precise cause of a defect in a product	Determination that defect caused damage
Tesco Stores Ltd & Anr v *Pollard* [2006] EWHC Civ 393	To illustrate the use of the regulatory compliance defence	Due diligence defence under s. 39 CPA 1987 and reg. 29 GPS Regulations 2005

Key further reading

Key articles/reports	How to use	Related topics
Deards, E. and Twigg-Flesner, C. (2001) The Consumer Protection Act 1987: Proof at last that it is protecting consumers? *Nottingham Law Journal* 10(2).	To assess how much protection the consumer receives under s. 3 and the s. 4(1)(e) defence of 'development risks' by examining key case decisions	Negligence, product safety
Freeman, R. (2001) Strict Product Liability laws – Consumer Protection Act provisions fail to assist claimants in three recent cases, *Journal of Personal Injury Law*, pp. 26–36 (Westlaw).	To examine critically the restricted protection given to consumers under s. 3 of CPA 1987 by three recent cases	Negligence, product safety, strict liability
Giliker, P. (2003) Strict Liability for Defective Products: The Ongoing Debate, 24 *Business Law Review* 4, pp. 87–90.	To trace development of the interpretation of ss. 3, 4(1)(e) and 6(4) of the CPA 1987 to see how far consumers are protected by the Act	Strict liability, negligence
Howells, G. and Mildred, M. (2002) Infected Blood: Defect and Discoverability, a First Exposition of the EC Product Liability Directive, 65 *Modern Law Review* 95–106.	To examine critically the reasoning of Burton J in the judgment given in *A & Others* v *NBA & Others*	Absolute and strict liability
Mildred, M. (2007) Pitfalls in Product Liability, 2 *Journal of Personal Injury Law*, pp. 141–49 (Westlaw).	Examines the definition of a defective product and highlights the limitations of consumer protection under the CPA 1987	Strict liability, negligence

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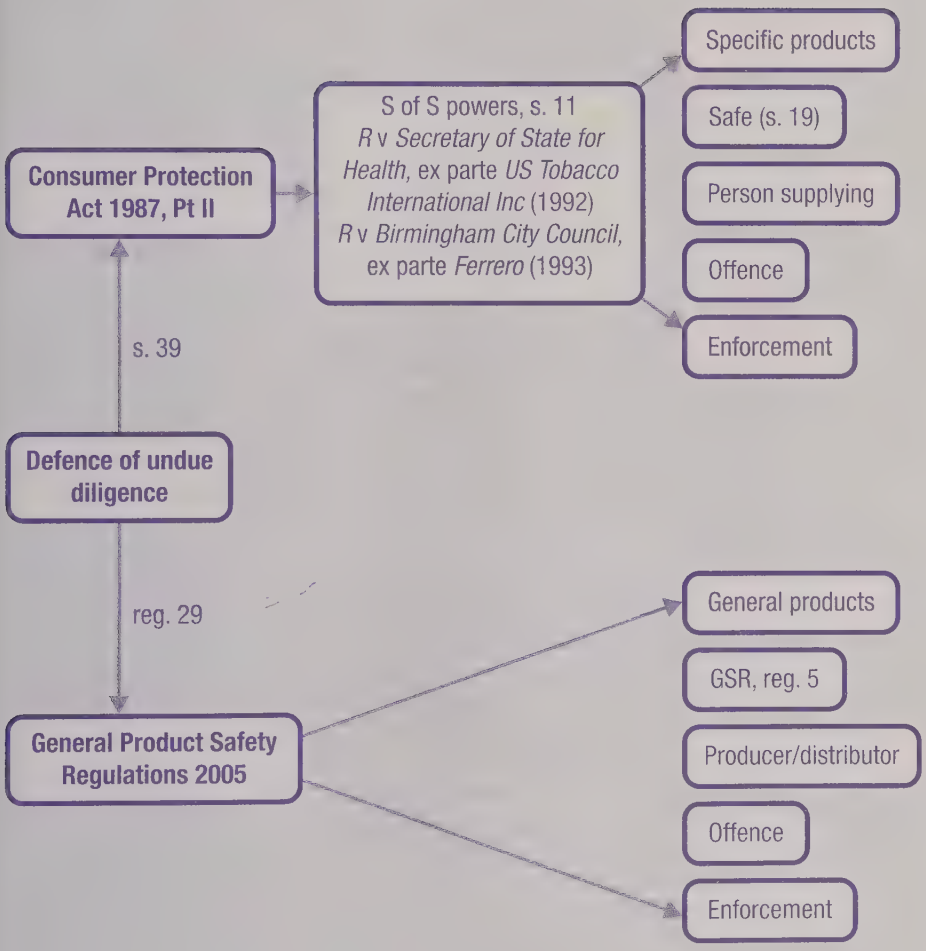
Product safety

Revision checklist

Essential points you should know:

- Product safety is covered by criminal liability
- How the Consumer Protection Act 1987 (CPA) provides for specific product safety
- Key provisions under the General Product Safety Regulations 2005 (GPS)
- Enforcement powers and penalties for both specific and general product safety

Topic map



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Introduction

In this chapter, we look at how the law protects users of products by imposing criminal sanctions, not only against producers, but also suppliers of unsafe goods as well.

Products that could have the potential to cause personal injury or death to those who use them are regulated currently by the Consumer Protection Act 1987, Parts I–V, and the General Product Safety Regulations 2005. Any amendments to product safety legislation post-Brexit will be governed by the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations, a draft statutory instrument laid before Parliament on 11 December 2018.

Assessment advice

Essay questions

This topic typically lends itself to a comparative analysis of legislation that determines the criminal liability of a producer or supplier. Alternatively, a question may require you to assess the degree of both criminal and civil protection offered to consumers for damage caused by defective products. In which case, you will need knowledge of the topics covered in Chapters 7 and 11 about how relevant provisions of the legislation have been interpreted by the case law – as well as through any current academic argument.

Problem questions

These may take the form of several individual scenarios based on purchasers or users of defective products who suffer injury while using them, from which you will be expected to explain and apply salient provisions of legislation and case decisions to the problems presented, and offer further comment if need be.

Product safety

Prior to the Consumer Protection Act 1987 (CPA) and the General Product Safety Regulations (GPS), consumer safety was governed by the Consumer Safety Act 1978, which was an enabling Act giving the Secretary of State powers to issue regulations to prevent the supply and sale of unsafe goods. This was followed by the Consumer Safety (Amendment) Act 1986, which was intended to prevent unsafe goods – most notably those imported from abroad – from reaching the market by giving customs and trading standards officers powers to detain imported goods, and if necessary, suspend their supply for up to six months, pending an application to the court for forfeiture and destruction.

Consumer Protection Act 1987, Part II

Part II of this Act consolidates the Consumer Safety Act 1978 and the Consumer Safety (Amendment) Act 1986, so as to provide:

- specific regulations for particular products.
- various enforcement powers to control trading in unsafe products.
- civil redress for injured persons on the basis of breach of statutory duty (s. 41(1)).

Specific safety regulations

Section 11 of the Act gives the Secretary of State extensive powers to make regulations concerning specific goods that will effectively:

- ensure that goods are safe by controlling factors such as their content, design, composition and packaging.
- restrict their availability for sale.
- require prescribed information to be supplied with the goods.

And

- under s. 11(5), the Secretary of State must consult organisations or persons who are likely to be affected by any proposal he may make.

R v *Secretary of State for Health, ex parte US Tobacco International Inc* [1992] QB 353

Facts
The Secretary of State introduced the Oral Snuff (Safety) Regulations in 1989, without consulting the applicants, who as it happened, were the sole manufacturers and packagers of snuff in the UK. The Regulations introduced draconian controls on supply and manufacture. Having been encouraged by the inward investment policy of the government to extend their business into Scotland, the applicants therefore argued that they should have been consulted first.

Legal principle
The procedure was deemed unfair and so the Regulations were quashed because there had been no consultation of affected parties.

Analysis
Given that the company was urged by the government to make further investment within the UK, they ought to have been given the opportunity to respond to the Secretary of State's proposals.

Occasionally, there is an urgent need to protect the public and for this reason s. 11(5) allows the Secretary of State to act without consulting any of the affected parties.

R v *Birmingham City Council, ex parte Ferrero* [1993] All ER 530

Facts
Ferrero manufactured chocolate eggs containing small replicas of self-assembly cartoon characters. A child choked to death after swallowing one such toy. The council issued a suspension notice stopping the *supply* of eggs for six months. Having tried unsuccessfully to persuade the council to withdraw the notice and accept undertakings not to supply, Ferrero then applied for relief by judicial review. As it was granted, the council appealed on the grounds that they had acted *intra vires* according to s. 11(5).

Legal principle
The appeal was allowed, as a local authority is under no duty to consult a trader either before or after service of a suspension notice.

Analysis
In this case the need to protect the public with immediate effect outweighed the requirement to consult affected parties.

Note that s. 11(7) excludes drugs and licensed medicinal products which have their own specific legislation.

Items covered by safety regulations

There are a miscellany of products that have been subject to regulation, including children's toys/pushchairs/nightwear/child-proof packaging, as well as such items as car tyres and flammable upholstery.

Consumer Protection Act 1987, Pt II, s. 19

'Safe' is defined in s. 19:

> . . . such that there is no risk or no risk apart from one reduced to a minimum that any of the following will . . . cause the death of or any personal injury to any person . . .

Exam tip

It is important to point out to the examiner that the definition given in s. 19 is concerned only with the dangers posed by the goods, and not with their quality. For example, a motorbike might be seen as intrinsically unsafe, but it only becomes unsafe under s. 19 if it has been rendered so by any of the factors mentioned below. Hence the Act seeks to set out minimum, rather than absolute standards of safety.

Section 19(1)(a)–(e) extends the definition of **safe** to include the following list of factors that may cause a product to be deemed unsafe:

- The goods.
- The way they are kept or consumed.
- The way they are assembled – if supplied unassembled.
- Any emissions or leakages from the goods themselves, or as a result of the way they have been kept, used or consumed.
- Reliance on the accuracy of any measurement, calculation or other gauge made by use of the goods.

Table 8.1 gives a practical example of when goods might be considered unsafe under the Act.

Table 8.1 Unsafe goods – examples

Safety factor	Examples of unsafe products
(a) Goods	Faulty bonnet catch on a car
(b) Storage and consumption	Stored safety equipment failing to operate
(c) Assembly	Inadequate instructions or missing items in flat-pack assemblies
(d) Leakages	Emissions from faulty safety caps
(e) Measurements and calculations	Inaccurate gauge settings that might lead to an accident

Breach of safety regulations

Under s. 12 a person commits an offence if he supplies, offers to supply, or agrees to supply, or even just displays for supply, any unsafe goods. Anyone found guilty of breaching these terms can be liable for a fine, or up to six months' imprisonment, or both.

Exam tip

Actually, the concept of 'supply' is given wide interpretation by the case law. For instance, in *Drummond-Rees* v *Dorset CC (Trading Standards Department)* [1998] 162 JP 651, the landlord of a holiday home was guilty of *supply*, quite naturally, when he let out his property with unsafe electrical wiring. On the other hand, in *Southwark LBC* v *Charlesworth* [1983] 147 JP 470, a shoe repairer was found guilty of *supply* when he happened to sell electric fires in the course of his business as a cobbler. It is interesting to note that 'acting in the course of a business' has a less restrictive interpretation in criminal law than that in civil law (see Chapter 1).

Enforcement powers

According to s. 13, the Secretary of State may serve on anyone the following notices (Table 8.2):

Table 8.2 Notices under s. 13

Notice under s. 13	Effect
(1)(a) A prohibition notice	Stops a person from supplying, offering, agreeing to or possessing for supply, any relevant goods deemed by the Secretary of State to be unsafe as described in the notice
(1)(b) A notice to warn	Requires a person at his own expense to publish as specified in the notice, a warning about relevant goods supplied by him which are deemed unsafe by the Secretary of State

Infringement of either of the above notices and the suspension notice described below is an offence which, on summary conviction, carries a penalty of three months' imprisonment, a fine, or both.

Other enforcement agencies include trading standards officers and weights and measures authorities, who are empowered to issue the notices and orders listed in Table 8.3.

Table 8.3 Notices and orders

Notice/order	Effect
s. 14: Suspension notice	Prevents disposal of stock for six months on reasonable suspicion that a trader might be supplying goods in breach of a safety regulation, except the enforcement authority is liable to compensate the trader should no breach have occurred.
s. 16: Forfeiture order	An application for forfeiture can be made by the enforcement authority to the magistrates' court for unsafe goods to be forfeited, whereupon they are either destroyed, repaired or salvaged. Trading standards officers can also inspect and seize goods for testing, and examine any associated documents.

General Product Safety Regulations 2005

Prior to these Regulations, general product safety was provided by s. 10 CPA 1987 which was replaced by the General Product Safety Regulations 1994 (GPS). The 2005 Regulations implemented the General Product Safety Directive 2001/95/EC and came into force on 1 October 2005, repealing the General Product Safety Regulations 1994.

Don't be tempted to . . .

Don't confuse the GPS Regulations 2005 with the specific product safety regulations provided for by the Consumer Protection Act 1987, Pt II or the General Safety Requirement in the now repealed s. 10.

General Safety Requirement (reg. 5)

It is an offence for a producer to:

- place an (unsafe) product on the market.
- offer or agree to place an (unsafe) product on the market.
- expose or possess an (unsafe) product for placing on the market.
- offer or agree to supply an (unsafe) product or expose or possess a product for supply.
- supply a product that is unsafe.

Producer and distributor (reg. 2)

The Regulations specifically refer to a producer and a distributor, and as such both terms are given a wide definition.

The definition of a *producer* within reg. 2 bears a marked similarity to that given by the Product Liability Directive, in that it includes a producer as being a manufacturer that can be a re-conditioner, or anyone holding himself out as a manufacturer in the EU. Furthermore, the term 'producer' also includes 'own-branders' and agents as well as importers operating within any EU state. Sometimes a supplier within the distribution chain has an adverse effect on a product's safety, in which case they would be liable as a 'producer' too.

A *distributor* is also a supplier, but can only be made liable if he knowingly supplies a product that is patently unsafe.

The Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 will redefine producers as limited to those individuals established in the UK rather than in an EU member state.

Exam tip

The distinction, then, between 'producer' and 'distributor' relies on the effect of the latter's factoring on the product's safety. A distributor will be termed a 'producer' in circumstances only where he mishandles the safe upkeep of a product he is responsible for distributing.

Duties of a producer (regs 5 and 7)

Under reg. 5, unsafe products must not be placed on the market by the producer. So far as is practicable, a producer should really give consumers information that will enable them to assess any inherent risks they consider a product may manifest over the course of its normal use, as prescribed by reg. 7.

Duties of a distributor (reg. 8)

Distributors are required to act with due care to make sure the products they supply are safe. If they are aware or suspect that a product is dangerous, they must not supply it. In any case, the distributor should, within reason, assist in the monitoring of the safety of a product placed on the market.

Product (reg. 2)

Products include second-hand goods, foodstuffs and medicines as well as products supplied for the consumer as part of a service. The Regulation excludes antiques and products that the consumer knows need re-conditioning.

Safe product (reg. 2)

The following definition of safe products is more explicit than that given in CPA 1987, Pt II, as it clarifies the degree of risk that can exist about a product as one which:

- does not present any risk or only minimal risk compatible with its use.
- is acceptable, and
- is consistent with a high standard of health and safety.

Nonetheless, the Regulation does recognise that there is no such thing as an absolutely safe product, but lists the following criteria to determine a product's safety.

Criteria regarding a product's safety

General Product Safety Regulations 2005, reg. 2

In determining the foregoing the following shall be taken into account in particular –

(a) the characteristics of the product, including composition, packaging, instructions for assembly and . . . instructions for installation and maintenance,

(b) the effect of the product on other products, where it is reasonably foreseeable that it will be used with other products,

(c) presentation . . . labelling, warnings, instructions for use and disposal and . . . any other information,

(d) the categories of consumer at risk when using the product, in particular children and the elderly.

Application of regulations (reg. 3)

This Regulation states that if a product complies with the following, then the general safety provisions do not apply:

- Specific EU requirements.
- Specific UK law requirements on health and safety.
- A voluntary national standard giving effect to an EU standard.

Defences under CPA 1987, Pt II and GPS Regulations 2005

The main defence a trader uses when accused of supplying an unsafe product is that of due diligence under s. 39 CPA 1987 and reg. 29 GPS Regulations 2005, as outlined in the Key Statute below.

Often, part of their defence is to blame others in the supply chain for the way they have dealt with the goods.

Consumer Protection Act 1987, Pt II and s. 39, and General Product Safety Regulations 2005, reg. 29

(1) . . . It shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence.

(2) Where in any proceedings against any person for such an offence the defence provided . . . above involves an allegation that the commission of the offence was due –

(a) to the act or default of another; or

(b) to reliance on information given by another . . .

Of course, in order to succeed in the defence a defendant must first identify the other person, and should he base his defence on information provided by another, he must show it was reasonable to rely on it, and that he took reasonable steps to verify its validity. This is stated in CPA 1987, Pt II and s. 39, and GPS Regulations 2005, reg. 29(4)(a), (b).

Penalties

Should an offence be established under regs. 5 or 8(1) of the GPS Regulations 2005, a court can impose one or other of the following penalties:

- A fine not exceeding £20,000.
- Imprisonment for up to 12 months.

Enforcement

Local authority trading standards officers, as well as environmental health officers, have powers to monitor and enforce safety standards by issuing the following notices (Table 8.4).

Table 8.4 Enforcement of safety standards: notices

Notice	Effect of notice
reg. 11: Suspension notice	Stops a trader from placing a product on the market or supplying it before it is checked
reg. 12: Requirements to mark	Where a product is known to be dangerous, the trader must pay to issue warnings of the risks

Notice	Effect of notice
reg. 13: Requirements to warn	Should a product pose any kind of category risk, then again, a trader must pay to issue a warning to that effect
reg. 14: Withdrawal notice	An enforcement authority can stop a product from being supplied and require the trader to alert consumers of the risk involved
reg. 15: Recall notice	Once a dangerous product is in circulation, an enforcement authority will require a trader to issue a recall notice

As part of their monitoring procedures, enforcement authorities also have powers to make test purchases (reg. 21) and are able to enter and search business premises to inspect any record or product. As a last resort, authorities can also apply to the court for a forfeiture order so that dangerous products can be destroyed (reg. 18).

Reform of regulation of product safety

The Department for Business, Energy & Industrial Strategy (BEIS) launched the Office for Product Safety & Standards in January 2018 following the recommendations of the Working Group on Product Recalls and Safety. Their remit is to strengthen the regulatory environment in order to offer improved protections for consumers as well as support for industry. How they aim to achieve this is outlined in their publication *Strengthening National Capacity for Product Safety: Strategy 2018–2020.*

Impress your examiner

When evaluating the extent of protection afforded to consumers by the product safety legislation it would be useful to show that you appreciate that while CPA 1987 provides civil redress for breach of statutory duty under s. 41(1), the GPS Regulations 2005 provide no such remedy. This is clear by virtue of reg. 42 which clearly states: 'These Regulations shall not be construed as conferring any right of action in civil proceedings in respect of any loss or damage suffered in consequence of a contravention . . . '. For such infringements, the consumer would have to rely on contractual liability or liability under Part I of the Consumer Protection Act 1987. What is more, there is as yet no equivalent legislation apart from the Supply of Goods and Services Act 1982 and health and safety legislation to ensure safety of services.

Putting it all together

Sample question

Could you answer this question? Below is a typical essay question that could arise on this topic. Additionally, a sample problem question and guidance on tackling it can be found on the companion website.

Essay question

Critically analyse the different ways in which the criminal law seeks to protect consumers against injury caused by defective products.

Answer guidelines

Approaching the question

The question is about protective measures imposed by the criminal law against injury caused by defective products, so you should focus on the product safety regulations.

It might be a good idea to deal with specific product safety regulations provided by Pt II CPA 1987 before tackling the GPS Regulations 2005. Finally, you should undertake a comparative analysis of the degree of protection offered to users of products by each. This should lead you into an effective conclusion in which you should refer to possible areas for reform.

Important points to include

You could start off by pointing out that the GPS Regulations apply to suppliers of all products intended for or likely to be used by consumers (even if not intended for them). They do not apply to personal sales. So they apply to products supplied to consumers either as goods or as part of a service for their own use. It would be useful to give examples, such as gym equipment for use in a gym. Don't forget to mention that the GPS Regulations also apply to products that were originally not intended for consumer use but which have been passed on to the consumer market. To avoid liability in this respect traders would have to operate a 'trade only' business. The definition of consumer therefore is wide and is focused on how the product is used and what purpose it is purchased for.

When dealing with protection under the criminal law, you should give a brief account of the background to the legislation on product safety. You should then focus on s. 11 CPA to define the powers given to the Secretary of State under this enabling Act. Don't forget to use case law such as *R* v *Secretary of State for Health, ex parte US Tobacco International Inc* to illustrate use and abuse of these powers. The definition of 'safe' in s. 19 should be outlined and evaluated using examples. You could leave

penalties and enforcement powers until you have dealt with the GPS Regulations. When dealing with the GPS Regulations you need to point out and explain changes such as the distinction between producer and distributor and the fact that these Regulations aim to ensure the safety of products used by consumers for their own ends rather than by employees in the course of their employment. Other differences such as the inclusion of second-hand products deserve a mention.

When dealing with the definition of 'safe', you should indicate how it differs from that given in CPA 1987. Definitions such as that of 'product' in reg. 2 are worth commenting upon. Turning to penalties, you could point out that penalties are stricter under the GPS Regulations 2005. As regards enforcement, you should describe and explain the different notices/orders and respective enforcement authority and take the opportunity to point out the extra powers of withdrawal and recall given under the GPS Regulations 2005. The defence of due diligence should be referred to before your conclusion, in which you should refer to areas for reform and current programmes of reform.

Impress your examiner

One area that you could elaborate on is that of the definition of 'product' and the difficulties presented when establishing whether or not a product is 'likely, under reasonably foreseeable conditions, to be used by consumers'. This widens the potential liability of producers in cases where products intended for business use are sold on to consumers. Enforcement also provides an area for contention. It would be useful to refer to journal articles on use of discretion by enforcement authorities in exercise of their powers and why they might be reluctant to use powers such as that of recall.

Key case summary

Key case	How to use	Related topics
R v *Secretary of State for Health, ex parte US Tobacco International Inc* [1992] QB 353	To emphasise the need to consult affected parties	Enforcement powers under EA 2002, Pt 8, s. 214 Consultation
R v *Birmingham City Council, ex parte Ferrero* [1993] All ER 530	To demonstrate waiver of the need to consult affected parties where suspension notice is served	Enforcement powers under EA 2002, Pt 8, s. 214 Consultation

Key further reading

Key articles/reports	How to use	Related topics
Cartwright, P. (2006) Enforcement, Risk and Discretion: The Case of Dangerous Consumer Products, 264 *Legal Studies*, pp. 524–43.	To assess the effectiveness of enforcement under the 2005 Regulations	Regulation of product safety, product liability
Cartwright, P. (2006) Total Recall? The Future of Consumer Product Safety Regulations, *Lloyd's Maritime Commercial Law Quarterly*, pp. 390–403.	To examine the recall powers under the 2005 Regulations and their effect on producers, distributors, enforcement authorities and consumers	Regulation of product safety, product liability
Office for Product Safety & Standards. *Strengthening National Capacity for Product Safety: Strategy 2018–2020.* Department for Business, Energy and Industrial Strategy. https://assets.publishing.service.gov.uk	To outline future consumer protection strategy for product safety	Regulation and enforcement of product safety measures

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9

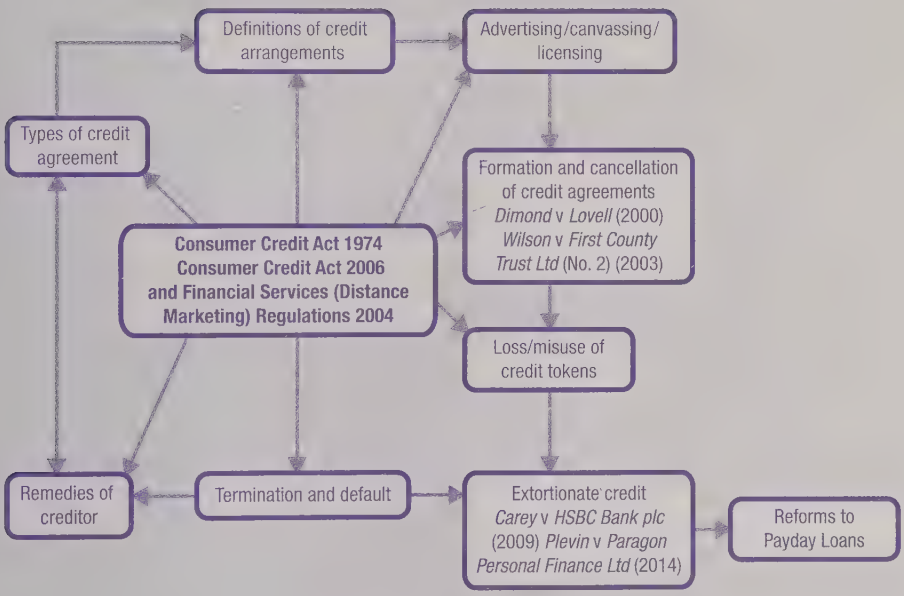
Consumer credit

Revision checklist

Essential points you should know:

- Methods of providing credit
- How credit agreements are formed and terminated
- The licensing arrangements for credit providers
- How advertising of credit is regulated
- The principles of enforcement of credit agreements by the creditor

Topic map


Definitions of credit arrangements
Advertising/canvassing/ licensing
Types of credit agreement
Formation and cancellation of credit agreements
Dimond v *Lovell* (2000)
Wilson v *First County Trust Ltd* (No. 2) (2003)
Consumer Credit Act 1974
Consumer Credit Act 2006
and Financial Services (Distance Marketing) Regulations 2004
Loss/misuse of credit tokens
Remedies of creditor
Termination and default
Extortionate credit
Carey v *HSBC Bank plc* (2009) *Plevin* v *Paragon Personal Finance Ltd* (2014)
Reforms to Payday Loans

A printable version of this topic map is available from **go.pearson.com/uk/lawexpress**

Introduction

All businesses and most individuals take out credit in one form or another. Credit is a money-lending service provided by a creditor to a debtor who pays for it in the form of interest.

Because some creditors were inclined to impose severe terms on borrowers, the Consumer Credit Act 1974 (CCA) was gradually implemented over 11 years to redress inequality of bargaining between consumer debtors and business creditors. It is worth noting that the CCA 1974 is not restricted to protecting consumers; it can protect those who are supplied with credit in the course of a business. Amendments to the CCA 1974 were introduced by the Consumer Credit Act 2006, to implement reforms to regulation including more control over licensing and unfair credit relationships as well as the creation of an ombudsman scheme to hear complaints regarding businesses licensed under the 1974 Act.

In any case, when attempting exam questions, you will be expected to demonstrate knowledge of the nature of these reforms and why they are needed.

Assessment advice

Questions on credit can take the form of **an essay**, **a problem**, **or a series of problem scenarios**. While essays may well focus on evaluation of regulation of consumer credit in general, problems tend to focus on single issues such as formation, termination or remedies for both parties. Whatever form the question takes, you will require detailed knowledge of relevant sections of the current legislation on credit. It is a good idea to make sure you have good knowledge of the reforms that were effected by the Consumer Credit Act 2006.

Types of credit transactions

It is useful to look at the main forms of credit provision before examining the protective measures given by the Consumer Credit Act 1974.

Hire purchase

Under a hire purchase agreement a debtor hires goods for a fixed time period by regular payment instalments and then is given the option to buy them, for a token sum of money, at the time of the last instalment. Hire purchase is popular with creditors as they can recover goods easily when the hirer fails to pay, because ownership of the goods does not pass until the option to purchase has been exercised. The owner of the

goods tends to be a specialist finance company which buys them from the supplier to hire to the debtor.

Conditional sale

As with hire purchase, ownership of property does not pass until all payment instalments have been made. However, in conditional sales, the debtor must buy the goods at the end of the term: they are not given the option. Conditional sales tend to be confined to the purchase of industrial plant and equipment.

Credit sale

Ownership of goods passes to the buyer (debtor) immediately, at the time of the contract or delivery, so that the buyer is provided with credit to allow time to pay. The buyer, as owner, can sell the goods or dispose of them before the end of the repayment agreement, as long as all outstanding amounts of credit are paid off.

Loans

A creditor lends money to a debtor so that the debtor can buy goods or services and the debtor repays the loan with interest over a period of time. Loans can be offered with or without security and secured loans may take the form of a registered charge over assets, or a third party guarantee. An unsecured loan can be made in the form of an overdraft facility provided by a bank or a personal loan, but interest on an overdraft facility is usually higher than that on a loan.

Credit cards

The holder of a credit card is given a credit limit and can use the card to buy goods, services, or cash advances. When a debtor pays a supplier by credit card, the supplier forwards details of the purchase to a credit card company which pays the supplier after deduction of a charge between 1 per cent and 4 per cent. The debtor receives a monthly account of spending with a request for a minimum amount that must be paid. If the debtor pays the amount in full, there is no interest charge, although any cash advance given is always subject to interest charges.

Trade credit

It is customary for traders to defer payment for goods or services and this type of credit is not subject to the protection offered by the Consumer Credit Act 1974. Small businesses, however, can gain some protection from the Late Payment of Commercial Debts (Interest) Act 1998 (see Chapter 5).

Consumer Credit Act 1974

The Consumer Credit Act 1974, as amended by the Consumer Credit Act 2006, is the main statute governing credit and provides for both civil and criminal liability. Before addressing the provisions of the Act, it is essential that the following definitions of credit arrangements are understood.

Regulated agreement

A definition of a **regulated agreement** is given in the Consumer Credit Act 1974.

> **Consumer Credit Act 1974, s. 189(1)**
>
> A 'regulated agreement' means a consumer credit agreement, or consumer hire agreement, other than an exempt agreement.

As the section refers to **consumer credit agreement**, consumer hire agreement and exempt agreement, these terms need to be explained. Section 8(1) states: a consumer credit agreement is an agreement between an individual (the debtor) and any other person (the creditor) by which the creditor provides the debtor with credit of any amount.

Credit agreement

An individual can be a person, a small partnership (two or three people) or an unincorporated association. For agreements created before 6 April 2008, a consumer credit agreement was limited to £25,000, excluding charges such as interest. Since 6 April 2008, this financial restriction has been removed by the Consumer Credit Act 2006. The following case shows the difference between a consumer credit agreement and a consumer hire agreement.

> ***Dimond* v *Lovell* [2000] 2 All ER 897**
>
> **Facts**
>
> L drove into the back of D's car and D hired a replacement car from 1st Automotive Ltd which specialised in hiring cars out in accidents without requesting payment until claims were settled. L's insurer – Cooperative Insurance Society (CIS) – refused to pay the hire charge of £364.63 because it claimed that the contract between D and 1st Automotive was an unenforceable consumer credit agreement and in any case, D had not mitigated her loss.

Legal principle
The House of Lords found that the agreement between D and 1st Automotive was a regulated consumer credit agreement and unenforceable because it infringed the CCA 1974. It was not a regulated consumer hire agreement because it was not capable of lasting more than three months. As the contract was illegal, neither Mrs D nor L's insurer had to pay for the hire car.

Analysis
As Hoffmann LJ commented in his judgment: 'The unenforceability of the agreement is a technical defect which more sophisticated drafting can easily correct.' As to Mrs D's duty to mitigate, he felt that she had taken reasonable steps to mitigate her damage by seeking the services of an accident hire company.

Consumer hire agreement

Section 15 of the CCA 1974 gives a definition of a consumer hire agreement.

Consumer Credit Act 1974, s. 15

(1) A consumer hire agreement is an agreement made by a person with an individual (the 'hirer') for the bailment of goods to the hirer, being an agreement which –

(a) is not a hire purchase agreement, and

(b) is capable of subsisting for more than three months, and

(c) does not require the hirer to make payments exceeding [£25,000].

Exam tip

It may be a good idea to let the examiner know that you are aware that the £25,000 financial limit does not apply to agreements made on or after 6 April 2008.

The agreement must be *capable* of running for more than three months, so it can still be a consumer hire agreement if it actually runs for less than three months. Likewise, as long as the hirer is not required to pay more than £25,000, it can still be a consumer hire agreement if actual payment exceeds £25,000. Remember, the £25,000 limit only applies to contracts made before 6 April 2008.

Exempt agreement

Exempt agreements are not regulated agreements and are listed as follows:

- Mortgage loans provided by building societies, local authorities and other non-profit making organisations to develop land.
- Low-cost credit in borrower–lender agreements offered to a limited class of individuals where the interest rate does not exceed the bank's rate +1 per cent or 13 per cent, whichever is the higher.
- Fixed-sum borrower–lender–supplier agreements (not conditional sale or hire purchase) where the maximum number of payments is four within 12 months.
- Credit card purchases where the account must be settled in full with one payment within a certain time.

Exam tip

It is worth pointing out that, since 6 April 2008, high-net-worth debtors and agreements relating to businesses can be exempted from most of the CCA 1974. The debtor or hirer has to be a natural person (not a partnership) of high net worth and must make a declaration agreeing to forgo the protection of the CCA 1974 (see s. 16A). Likewise, a debtor or hirer who makes agreements mainly for their business, trade or profession may find that their agreement is exempt (see s. 16B). The effect of these provisions is to remove credit protection for rich individuals and those who borrow for business purposes. However, a small degree of protection is offered by way of the unfair credit relationship provisions with regard to extortionate credit.

More definitions

Sections 10 and 11 of the amended CCA 1974 give further definitions of credit transactions which are summarised in Table 9.1.

Borrower–lender–supplier (BLS) agreements

A borrower–lender–supplier or BLS agreement is one in which the creditor is the supplier of goods or services, or where the creditor has or intends to have a business connection with such a supplier. Section 12 of the amended 1974 Act defines three types of BLS agreement, as follows:

- **Restricted-use credit** where the creditor is the supplier, e.g. credit sales.
- Restricted-use credit where the creditor has an existing or proposed future arrangement with a supplier, e.g. payment by credit card.

Table 9.1 Definitions of credit transactions

Consumer Credit Act 1974 (amended) section number	Credit transaction
Section 10: **Running-account credit** and fixed-sum credit	Running-account credit agreements allow for separate contracts and can run indefinitely, as long as the debtor makes regular monthly repayments and does not exceed a credit limit, for example, a Visa credit card Fixed credit agreements have their credit set at a fixed sum and it will be discharged once this sum has been paid off, for example, a bank loan
Section 11: Restricted-use credit and unrestricted-use credit	Restricted-use credit is transferred from the creditor to the supplier of the debtor's goods and services, for example, hire purchase and conditional sale agreements as well as credit card transactions With unrestricted-use credit, the money is given to the debtor personally, even if granted for a specific purpose

- **Unrestricted-use credit** where the creditor has a pre-existing arrangement with a supplier, and knows that the loan is to finance a transaction between debtor and supplier. This is rare, because a creditor would be more likely to transfer the money directly to the supplier making it a restricted-use arrangement, as described in the point above.

Borrower–lender (BL) agreements

Here there is no connection between the creditor and supplier of goods and services and CCA 1974 does not apply to the agreement between the supplier and debtor.

Exam tip

It is essential that you understand the difference between BLS and BL credit agreements, because where there is a business connection between a creditor and supplier, both supplier and creditor will be liable to the customer for potential misrepresentations and breaches of contract by the supplier.

Don't be tempted to . . .

Don't forget, a credit agreement can be a multiple agreement. Usually, restricted-use credit transactions will be BLS agreements and unrestricted-use transactions will be BL agreements. So, credit sales and hire purchase will be restricted-use BLS agreements. Credit cards are combination agreements because if they are used to obtain a cash loan, they are unrestricted-use credit under a BL agreement. However, should the credit card be used to pay for goods and services, they transform into restricted-use BLS agreements under s. 12(b) CCA 1974.

Non-commercial agreements

CCA 1974 does not extend to **non-commercial agreements**, such as those between family members. A non-commercial agreement in the context of credit would be a consumer credit or hire agreement made by a creditor or owner in the course of their business.

The following case clarified the meaning of 'in the course of a business'.

Hare v *Schurek* [1993] CCLR 47

Facts

The claimant was a car dealer who did not normally provide credit to his buyers but on one occasion decided to supply a car to a friend on hire purchase terms. The question arose as to whether or not he needed a licence under the Consumer Credit Act 1974.

Legal principle

The Court of Appeal decided that as the claimant did not operate a consumer credit or hire business, the agreement was not made in the course of a business and being non-commercial according to the CCA 1974, no credit licence was required.

Analysis

Hence a private one-off loan by an individual in a business not associated with credit is not a business activity.

Advertising, canvassing and licensing of credit

The aim of the controls on advertising and canvassing is to promote truth in lending and to encourage customers to 'shop around' for credit.

Advertising

Advertising of credit is controlled by the Consumer Credit (Advertisements) Regulations 2004 which aim to ensure that consumers are supplied with enough information to enable them to make an informed choice. All advertisements should therefore use plain and intelligible language, be legible or audible and state the name of the advertiser. Also, if the consumer's house is required for security, a specifically worded warning should be printed in the advertisement.

Canvassing (s. 48 CCA 1974)

Canvassing involves making unsolicited oral representations off trade premises to try to persuade a consumer to enter into a regulated agreement. So, if a credit provider visits a customer at any trade premises or responds to a home visit request from a customer, they are not canvassing for credit. Table 9.2 outlines controls on canvassing.

Table 9.2 Controls on canvassing

Total prohibition on canvassing off trade premises	No total prohibition on canvassing off trade premises
Borrower–lender agreements (cash loans)	Other credit agreements
Criminal offence under s. 49 even if solicited, unless signed request in writing from customer	Doorstep promotion of credit for goods and services with specific canvassing licence
	Bank employees can canvass for overdraft facilities in customer's home

Licensing

There are several categories of business activity which need a credit licence, including consumer credit and hire businesses, credit brokerage, debt adjusters and counsellors, debt collectors and credit reference agencies. The Office of Fair Trading regulates the conduct of those who are licensed to provide credit and anyone in default can be subject to a civil fine of £50,000. Offering credit without a required licence is a criminal offence and agreements made by an unlicensed trader are generally unenforceable against a debtor.

Criminal offences

The following offences are provided by CCA 1974, ss. 45–51:

- Advertising restricted-use credit for goods and services without offering them for cash.
- False or misleading advertisements for credit.

- Canvassing of BL agreements off trade premises.
- Soliciting a BL agreement off trade premises in response to a request that is not in writing or signed.
- Sending circulars to minors to invite them to borrow money; obtaining goods or services on credit or hire; or applying for information or advice on borrowing, credit or hire.
- Giving a person an unsolicited credit token.

Formation of a consumer credit agreement

Before entering into a consumer credit agreement, a customer must be given pre-contract information in a separate document; otherwise the agreement will be unenforceable without a court order. Regarding antecedent negotiations, CCA 1974 recognises that these may involve several parties and makes provision for this in s. 56. Section 56 defines antecedent negotiations as:

- Creditor negotiating with debtor.
- Credit broker negotiating with debtor regarding goods sold or to be sold to the creditor with a view to a BLS agreement.
- Supplier negotiating with debtor or hirer regarding a BLS agreement.

Antecedent negotiations are deemed to start when the negotiator and the debtor or hirer first enter into communication.

Withdrawal from prospective agreements

Section 57 allows a person to withdraw from a prospective regulated agreement and any linked transactions such as insurance, or installation or servicing of goods, by giving oral or written notice to anyone acting as a negotiator.

Making the agreement

An agreement must contain 'key financial information', 'other financial information' and 'key information' as stipulated by the Consumer Credit (Agreements) (Amendment) Regulations 2004. Furthermore, s. 60 CCA 1974 lists the required form and content of agreements which, if not adhered to, will result in the agreement being seen as improperly executed (s. 61). Until an agreement is signed by both parties, it is unexecuted. Sections 62 and 63 describe the duty to supply copies of unexecuted and executed agreements respectively and to let the debtor know of any rights to revoke and cancel the agreement. The duty to supply copies of agreements with notice of cancellation rights does not apply to non-commercial agreements, overdrafts on current accounts, or small BLS agreements for restricted-use credit (up to £50).

Improper execution of the agreement

Prior to CCA 2006, some improperly executed agreements could not be enforced.

Wilson v *First County Trust Ltd (No. 2)* [2003] UKHL 40

Facts
A debtor took out a loan using her car as security. However, there was a mistake in the agreement about the amount of credit.

Legal principle
The agreement was unenforceable under s. 127(3)–(5) CCA 1974 because it had been improperly executed.

Analysis
Two of the issues before the court were: 1) whether the Human Rights Act 1998 applied in this case, and 2) whether s. 127(3) of the Consumer Credit Act 1974 was incompatible with the European Convention on Human Rights. The court held that s. 127(3) was incompatible with the rights of the creditor who despite being a company was protected by the Human Rights Act 1998 as a 'person'.

Because of litigants like Mrs Wilson, who enriched themselves by means of debt avoidance on technical grounds, s. 127 was amended by the CCA 2006, so that a court now has discretion to decide whether or not to grant an enforcement order in such cases.

Consumer Credit Act 1974, s. 127

(1) In the case of an application for an enforcement order under –

(a) Section 65(1) (improperly executed agreements) . . .

the court shall dismiss the application if, but only if, it considers it just to do so having regard to –

(i) prejudice caused to any person by the contravention in question, and the degree of culpability for it . . .

Exam tip

When examining the rules for formation of credit agreements it is useful to point out that the amendments introduced by CCA 2006 mean that a court now always has the power to enforce an agreement under s. 127(1) and (2). Thus, cases like *Wilson* v *First County Trust* and *Dimond* v *Lovell* would be decided differently now, so that litigants can no longer be unjustly enriched because of minor technical infringements of the rules.

Withdrawing from a regulated agreement (s. 66A)

A debtor can withdraw from most credit agreements within 14 days of the agreement being made. However, this right to withdraw applies *only* to the credit agreement, and not to any agreement to purchase goods or services with the credit. The right of withdrawal does not apply to agreements for credit above £60,260 or credit secured on land or restricted-use credit to purchase land.

Cancelling a regulated agreement

A regulated agreement may be a **cancellable agreement** if it is cancellable according to s. 67 CCA 1974. A cancellable agreement is an agreement signed by a debtor away from the trade premises of the creditor or supplier. This may be cancelled as long as it is not secured on land.

The policy behind cancellable regulated agreements is to discourage high-pressure doorstep selling. Section 68 of the 1974 Act provides a cooling-off period of five clear days (14 in some circumstances) from receipt of the copy of a signed cancellable agreement. This means that the debtor can cancel the agreement as long as it is in writing and the cancellation is effective as soon as posted (Table 9.3).

Table 9.3 Cancellation rights under ss. 67–73 for off trade premises contracts

Oral representations must have been made in the presence of the debtor (not by telephone)
The agreement is not secured on land
A notice of cancellation rights must be included within the copy of the credit agreement and sent by post or email within seven days
The debtor has five clear days (not counting the date of receipt) in which to cancel
In the absence of notice of cancellation rights, the agreement is unenforceable
It a second copy of the agreement is not sent within seven days, the cooling-off period is 14 days.

Credit agreements made at a distance

The Financial Services (Distance Marketing) Regulations 2004 apply to consumer credit agreements made at a distance – for instance, over the telephone or online. The regulations require that certain information must be provided in good time before the consumer is bound by the contract (Table 9.4).

Table 9.4 Information requirements for credit agreements made at a distance

Name and address of the creditor
Description of the main characteristics of the credit agreement
Total price payable for the credit and arrangements for payment information regarding a right of withdrawal
Information about a right of withdrawal and the right to a 14-day cooling-off period for cancellation of the agreement.

Liability of supplier and creditor

The creditor will be liable for any misrepresentations or breaches of contract made by the supplier by virtue of ss. 56 and 75 CCA 1974 (Table 9.5).

Table 9.5 Liability of creditor

CCA 1974 section no.	Provision of section
Section 56: Antecedent negotiations	Any credit broker or supplier who negotiates with a debtor will be seen to be acting as the agent of a creditor
Section 75: Liability of creditor for breaches by supplier	The creditor is jointly liable with the supplier for any misrepresentation or breach of contract as long as the agreement: – is a regulated credit agreement. – relates to an item of cash price £100–£30,000. and – the credit is provided under an agreement between creditor and supplier.

Important points about s. 75

- The creditor and supplier must be different persons.
- Any exclusions of liability for breach and misrepresentation that apply to the supplier apply to the creditor too.
- As the creditor and supplier *are jointly and severally liable*, either or both can be sued.
- Does not apply to non-commercial agreements.
- Only applies to purchases bought with a credit card, rather than a debit or cheque guarantee card.
- Applies even where the debtor exceeds the credit limit.
- Applies to goods supplied using part credit and part cash. The creditor is liable to refund the whole amount (credit and cash).
- It is not possible to contract out of s. 75.

It was argued that equal liability did not apply to overseas transactions made by UK card holders; however, in *Office of Fair Trading* v *Lloyds TSB Bank plc* [2006] 2 All ER 821 the Court of Appeal held that s. 75 does apply to transactions made abroad using UK-issued credit cards.

Loss or misuse of credit tokens

A definition of credit tokens is given by s. 14(1).

Consumer Credit Act 1974, s. 14(1)

A credit token is a card, cheque, voucher, coupon, stamp, form, booklet or other document or thing given to an individual by a person carrying on a consumer credit business, who undertakes –

(a) that on the production of it . . . he will supply cash, goods and services . . . on credit, or

(b) that where, on the production of it to a third party . . . the third party supplies cash, goods and services . . . he will pay the third party for them . . . in return for payment to him by the individual.

A debtor is not liable for a credit token until it has been accepted either by signing it, signing a receipt for it, activating it or using it. Once a credit token has been accepted, then the debtor must give notice to the issuer when the card has been lost, stolen or misused. Until notice is given, the debtor remains liable for any loss arising. Although notice can be given orally, the credit agreement may stipulate that written notice must be given within seven days of verbal notification (see Table 9.6).

Table 9.6 Extent of debtor's liability for lost, stolen or misused credit tokens before notice given

Circumstances of loss	Debtor's liability
Card given to misuser with debtor's consent	Debtor has unlimited liability
Card obtained by misuser without owner's consent	Debtor liable for £50 only or the credit limit – whichever is lower
Card used fraudulently in distance selling transaction	Debtor not liable for loss and entitled to cancel payment or a re-credit if payment has been made (Consumer Protection (Distance Selling) Regulations 2000).

Extortionate credit terms

CCA 2006 repealed the extortionate credit provisions in ss. 137–140 CCA 1974 and replaced them with new unfair relationship provisions in ss. 140A–140C. Sections 140A and 140B apply to unregulated as well as regulated agreements. When determining whether or not a debtor/creditor relationship is unfair, under s. 140A, a court will consider:

- the nature of the terms.
- the manner in which the creditor has exercised his rights.

or

- any other thing done by or on behalf of the creditor, before or after the agreement.

Carey v *HSBC Bank plc* [2009] EWHC 3417 QB

Facts
A bank failed to supply a debtor with the required copy of a loan agreement within a stipulated time period of 12 days. The debtor claimed that the relationship was unfair because of this omission on the part of the bank.

Legal principle
Although the bank's failure to execute the agreement properly made the agreement temporarily unenforceable, it did not render the relationship unfair.

Analysis
Following this case, in October 2010, the OFT (now the FCA) being concerned that debtors might be misled into thinking they could have their debts written off ▶

by virtue of ss. 77 and 78, issued guidance on the obligations of creditors under ss. 77 and 78. The guidance was designed in part to make consumers aware that they may be at risk if they try to use these sections to avoid paying off their debts.

Don't be tempted to . . .

Don't suppose that a court will readily assume an unfair relationship under s. 140A. Each case is decided on its own facts but it is apparent that there has to be some evidence of bad faith, such as failing to state who has been paid commission or misleading borrowers into paying personal protection insurance as a mandatory condition for taking out a loan.

Plevin v *Paragon Personal Finance Ltd* [2014] UKSC 61

Facts

On a broker's advice Mrs Plevin took out a 10-year loan of £34,000 from Paragon together with PPI for £5,780 over five years. The commission of 71 per cent was divided between the broker and Paragon. This was a poor deal for Mrs Plevin because the PPI covered only half the term of the loan and she had life insurance, as well as sickness and redundancy benefits from her employment. Having settled out of court with the broker for £3,000, Mrs Plevin claimed against Paragon on the grounds that the agreement was unfair under s. 140A on the basis that the broker had acted on behalf of Paragon and non-disclosure of the amount of commission for the PPI.

Legal principle

As the broker was Mrs Plevin's agent rather than the lender's, then there was no breach of s. 140A; however, Paragon's failure to disclose the amount of the commission constituted a breach of s. 140A.

Analysis

It is interesting to note that Lord Sumption held that the decision in *Harrison* v *Black Horse Ltd* [2012] Lloyd's Rep IR 521 was wrong. In that case the Court of Appeal held that failure to disclose commissions did not result in an unfair relationship as there was no statutory duty under the Insurance Conduct of Business Rules (ICOBR) to do so. In his reasoning Lord Sumption stated that the court's determination of fairness may be influenced by the standard of commercial conduct which may be reasonably expected of the lender. While the ICOBR impose a minimum standard of conduct only, s. 140A introduces a broader test of fairness which may be measured by a wider range of factors.

Impress your examiner

In assessing an unfair relationship the court will look at wider considerations than merely following FCA rules. Such considerations will include the characteristics of the borrower, the range of choices available and the facts the borrower could reasonably be expected to know or assume as well as how far the creditor was or should have been aware of these matters. You could point out that the decision of the Supreme Court in the *Plevin* case has overruled the Court of Appeal's decision in *Harrison* v *Black Horse Ltd* [2012] Lloyd's Rep IR 521 where the lender was held not to have acted unfairly by complying with the FSA's rules.

On finding that an unfair relationship exists, a court may, on application by the debtor, issue an order under s. 140B, which empowers it to:

- order repayment of any sum paid by a debtor or surety.
- order a creditor to do or refrain from doing anything specified in the order.
- reduce or discharge any sum payable by the debtor or surety under the agreement.
- direct the return of property taken as security under the agreement to a surety.
- set aside, partly or wholly, any duty imposed on the debtor or surety under the agreement.
- alter the terms of the agreement or any related agreement.
- direct accounts to be taken between any persons (the court is allowed to ask for accounts to be kept of any credit payments made by the debtor to the creditor or anyone authorised by the creditor to collect payment).

Reforms to payday loans

Payday loan companies avoided the unfair relationship category in the CCA by being transparent about their APR, so they could charge high interest rates, and by lending to high-risk borrowers, for which they were justified in charging higher interest rates.

Still, as a consequence, vulnerable consumers found themselves in a spiral of debt, repeatedly having to roll over unpaid loans, from one month to the next, and being charged exorbitant fees for doing so.

Following which, the FCA instituted new rules for payday lenders with effect from 2 January 2015, the most important being:

- The maximum charge for credit (in terms of interest and fees) is 0.8 per cent per day, or no more than 100 per cent on the amount borrowed.
- Any 'late payment fee' is to be set at a maximum of £15.
- The number of 'rollovers' for unpaid loans is to be limited to two.

Impress your examiner

On the reforms it is a good idea to show the examiner that you understand how these reforms might operate by explaining that if the debtor borrowed £100, the interest payable would be no more than 80p a day, so that the maximum interest payable after 30 days would be £24.

Often payday lenders would use continuous payment authorities (CPA) to collect unpaid debts from the bank accounts of their customers.

Under the new rules, lenders only have two opportunities to use a CPA. Where there are insufficient funds in a debtor's account to cover an outstanding debt, the lender now has to inform the debtor. Before, the lender was able to 'clear out' whatever money was in the debtor's account towards settling the debt.

Exam tip

It is useful to point out that the new rules also encourage payday lenders to issue loans more responsibly by insisting (a) that the lender must clearly display a risk warning to potential debtors as follows: *Warning: Late repayment can cause you serious money problems. For help, go to moneyadviceservice.org.uk*; and (b) that lenders also have a duty to give the debtor information about debt help if the debtor is refinancing or rolling over an existing loan.

Termination and default

A debtor may wish to terminate an agreement by paying the debt off early, or may default owing to a change in financial circumstances, in which case the creditor may wish to terminate the agreement (Table 9.7).

Termination by the creditor

Although some agreements allow a creditor to terminate an agreement at will when the debtor becomes unemployed or is convicted of dishonesty, in most cases a creditor terminates an agreement owing to the debtor's default.

Default

A default notice must be served on the debtor if the creditor wishes to end the agreement, recover possession of goods or land, or enforce any security (s. 87). The default notice has to explain the breach, and what is required to put it right. If the breach cannot be rectified, the creditor should state how much compensation is

Table 9.7 Early settlement by the debtor

Regulated consumer credit agreement	Hire purchase and conditional sale
CCA 1974, s. 94(1): Debtor can settle the debt at any time by giving written notice to the creditor	CCA 1974, s. 99(1): Debtor can terminate the agreement by giving written notice to creditor
CCA 1974, s. 95: Debtor will be entitled to a rebate on interest	CCA 1974, s. 99(2): Debtor must pay arrears and unless a lower termination price or no price is stipulated in the agreement, will have to bring payments up to half the total price (s. 100(1))
	CCA 1974, s. 100(4): Debtor must compensate creditor for loss caused to the goods.

required and by what date, as well as the consequences of non-compliance. The debtor should be given seven days to comply with the default notice.

Where the debtor remedies the breach, it is treated as not having occurred, but if the debtor ignores the notice, the creditor can terminate the agreement.

Repossession of goods under hire purchase and conditional sale

Although the property in the goods remains with the seller under hire purchase and conditional sale agreements, s. 90 provides that a creditor must obtain a court order to enter premises to repossess goods from a debtor who has paid one-third of the total price by the time of the breach.

Consumer Credit Act 1974, s. 90(1)

At any time when –

(a) the debtor is in breach of a regulated hire purchase or a regulated conditional sale agreement . . . and

(b) the debtor has paid to the creditor one-third or more of the total price of the goods and

(c) the property in the goods remains in the creditor

the creditor is not entitled to recover possession of the goods . . . except on an order of the court.

Exam tip

Section 90 stopped the practice of 'snatch back' by creditors who, formerly, would repossess goods from defaulting debtors at any stage of the agreement. Now, any creditor who breaches s. 90 faces severe penalties in that the agreement will be terminated, and the debtor will be freed from all liability and will be able to recover from the creditor all sums paid under the agreement (s. 91).

Don't be tempted to . . .

Don't mix up early settlement with repossession. Be careful not to make the mistake of thinking that s. 90 applies where a debtor has exercised a right of termination of a hire purchase or conditional sale agreement. In such cases, as outlined above, ss. 99–100 apply to cover the obligations of the debtor.

Remedies of the creditor

Apart from exercising rights to terminate a credit agreement or repossess goods under a hire purchase or conditional sale agreement, a creditor can also make a claim for arrears (an agreed sum) or damages against a debtor who breaches an agreement.

Action for arrears

Although a creditor has the right to sue a debtor for arrears, CCA 1974 safeguards the consumer's interests as follows:

- The rate of interest payable on arrears should be no more than the rate for the total charge for credit (s. 93).
- The court may make a time order under s. 129.
- The creditor must give the debtor notice before demanding early payment of any sum under s. 87 (see above).
- The court may re-open an extortionate credit bargain under s. 140B (see above).

Time orders

A time order can be granted where a creditor brings an action to enforce a regulated agreement, to repossess goods or land, or take any security. Upon receiving a default notice, a debtor or hirer may apply for a time order as long as 14 days' notice of the application is given to the creditor. A time order usually applies to sums owed, but with hire purchase and conditional sales it can apply to sums payable under the agreement.

Damages

The measure of damages in the case of early termination of a hire purchase or conditional sale agreement differs according to who terminated the agreement (Table 9.8).

Table 9.8 Damages for early termination of agreement

Termination of hire purchase/ conditional sale agreement by *debtor*	**Termination of hire purchase/ conditional sale agreement by *creditor***
Creditor can sue for damages: Measure of damages is calculated according to s. 100(1) so that the debtor has to pay a sum to make up 50 per cent of the total cost of the goods + any installation costs in full, unless the court is satisfied that the creditor's loss is less than this sum (s. 100(3))	Where the creditor terminates owing to debtor's breach (but not repudiation): Creditor can claim for arrears + interest; + any amount needed to compensate for damage to the goods Cannot normally claim for loss of a bargain, unless the creditor makes the broken term an essential term of the contract – in which case the contract will be deemed to be repudiated by the debtor and the creditor may be allowed to claim for loss of bargain
Goods must be returned to the creditor	Goods can be repossessed by creditor

Using the common law, a creditor can always make it an essential term of the agreement that the debtor pays instalments on time and, if not, can treat the contract as repudiated by the debtor. If the agreement is repudiated by the debtor's breach, then it is the debtor who is terminating the agreement by breaching an essential term, thus entitling the creditor to claim damages for loss of a bargain. You may wish to refer to Chapter 2 for the common law rules on classification of terms and measurement of loss.

***Lombard North Central plc* v *Butterworth* [1987] 1 All ER 267**

Facts

A term in a contract for the hire of computers stated that prompt payment of all instalments was essential. The defendant breached this term by making several late payments and the creditor terminated the agreement and claimed damages for loss of the whole contract (loss of bargain). ▶

Legal principle
Because the term was described as an essential term, its breach amounted to repudiation by the defendant and so the creditor had the right to terminate the agreement and claim damages for loss of a bargain.

Analysis
In his ratio Mustill LJ stated: 'A stipulation that time is of the essence in relation to a particular contract term, denotes that timely performance is a condition of the contract . . . It follows that where a promisor fails to give timely performance of an obligation in respect of which time is expressly stated to be of the essence, the injured party may elect to terminate and recover damages . . . '

Don't be tempted to . . .

It is easy to mistake an action for an agreed sum for an action for damages. They are different. In an action for an agreed sum a person will sue for an amount agreed in the contract, such as the price. In a credit sale, an agreed sum would be the credit provided plus interest, which may involve claiming for arrears. Actions for damages, on the other hand, are subject to the common law contractual rules on remoteness of damage, measure of loss and mitigation.

Putting it all together

Sample question

Could you answer this question? Below is a typical problem question that could arise on this topic. Additionally, a sample essay question and guidance on tackling it can be found on the companion website.

Problem question

Nick, a double glazing representative for Fullglaze Ltd, called on Faith at her house and persuaded her to enter into a credit sale agreement to finance replacement windows and doors in her home. The total price was £7,200, payable in 48 monthly instalments of £150. In his eagerness to keep an appointment with another potential customer, Nick entered an incorrect figure on the agreement (for the cost of credit).

Faith and Nick signed both copies and he gave her a copy together with notice of her cancellation rights. Four days later, on Friday, Faith changed her mind and wished to cancel the agreement. She phoned up Fullglaze Ltd to inform it of her change of mind and was told to send a letter of cancellation to Head Office immediately. Faith sent an email instead but it was not accessed until the following Tuesday.

Fullglaze is insisting that Faith is bound by the agreement and is threatening to take legal action against her.

Advise Faith.

Answer guidelines

Approaching the question

The question concerns an improperly executed credit agreement made off trade premises and related rights of cancellation. You may also mention that it is possible that Nick is canvassing for credit. As well as explaining the implications of improperly executed agreements and the right to cancel, you also need to advise Faith since she may be bound by the agreement, in which case you will need to explain remedies available to Fullglaze.

Important points to include

- Identify the agreement as a borrower–lender–supplier restricted-use credit agreement and explain what this means.
- Deal with the canvassing issue and apply and explain the provisions in s. 48 CCA 1974.
- Improper execution: explain the provisions in CCA 1974 on formation of credit agreements: ss. 60, 61, 62 and 63. Then explain how s. 127 CCA 2006 has reformed the requirements for properly executed agreements by giving judges discretion to uphold improperly executed agreements.
- Rights of cancellation: identify the agreement as an off trade premises agreement and explain the cancellation rights under s. 67 CCA 1974. Apply the cooling-off period (described in s. 68) to the scenario and address the issue of an emailed cancellation notice to decide whether or not Faith has cancelled the agreement.
- In the event of Faith being bound by the agreement, explain the remedies available to Fullglaze: action for arrears (s. 86).

Impress your examiner

With regard to improper execution of agreements, explain that the amendments regarding execution of agreements aim to deter persistent litigants, like Mrs Wilson, from profiting from minor technical infringements in the execution of credit agreements thereby enriching themselves by means of debt avoidance

on technical grounds. Summarise the judgments in cases like *Dimond* v *Lovell* and *Wilson* v *First County Trust*. Then explain how s. 127 was amended to give judges the discretion to uphold improperly executed agreements. Point out that the amended s. 127 is wide enough to empower a court to ignore technical infringements made by mistake, but enforce an agreement where technical infringements have been deliberate. With regard to the cooling-off period, it is questionable whether five clear days after receipt of the agreement or notice of statutory cancellation rights is long enough; perhaps it should be extended.

Key case summary

Key case	How to use	Related topics
Dimond v *Lovell* [2000] 2 All ER 897	To show the distinction between a consumer credit agreement and a consumer hire agreement	Enforcement of a regulated credit agreement
Wilson v *First County Trust Ltd (No. 2)* [2003] UKHL 40	To give an example of an unenforceable credit agreement owing to improper execution	Formalities required for distance contracts of credit
Carey v *HSBC Bank plc* [2009] EWHC 3417 (QB)	To demonstrate that a non-compliance with formal requirements will not make a relationship unfair	Test of fairness in consumer rights legislation
Plevin v *Paragon Personal Finance Ltd* [2014] KUSC 61	To show that factors to consider in assessing an unfair relationship focus on situational characteristics rather than compliance with FCA rules	Test of fairness in consumer rights legislation
Lombard North Central plc v *Butterworth* [1987] 1 All ER 267	To illustrate that repudiation by the defendant can amount to breach of contract	Remedies for breach of contract
Hare v *Schurek* [1993] CCLR 47	To clarify the definition of 'the course of a business'	Operating 'in the course of a business' for the purposes of sale of goods and consumer safety

Key further reading

Key articles/reports	How to use	Related topics
Dobson, P. (2006) Consumer Credit Act 2006, *Student Law Review* 49 Autumn.	Summary of the key changes to the Consumer Credit Act 1974 introduced by the Consumer Credit Act 2006	Regulation of consumer contracts
Competition and Markets Authority Payday Lending Market Investigation (27 June 2013, updated 17 June 2015). www.gov.uk/cma-cases/payday-lending-market-investigation	Summarises reforms introduced to control payday lending	Regulation of consumer credit agreements
Financial Conduct Authority. *Review of retained provisions of the Consumer Credit Act: Final report* (March 2019). https://www.gov.uk	Report to Parliament on whether or not the repeal of provisions of the CCA and replacement by FCA rules or guidance under the Financial Services and Markets Act 2000 would adversely affect consumer protection	Regulation of credit agreements

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10

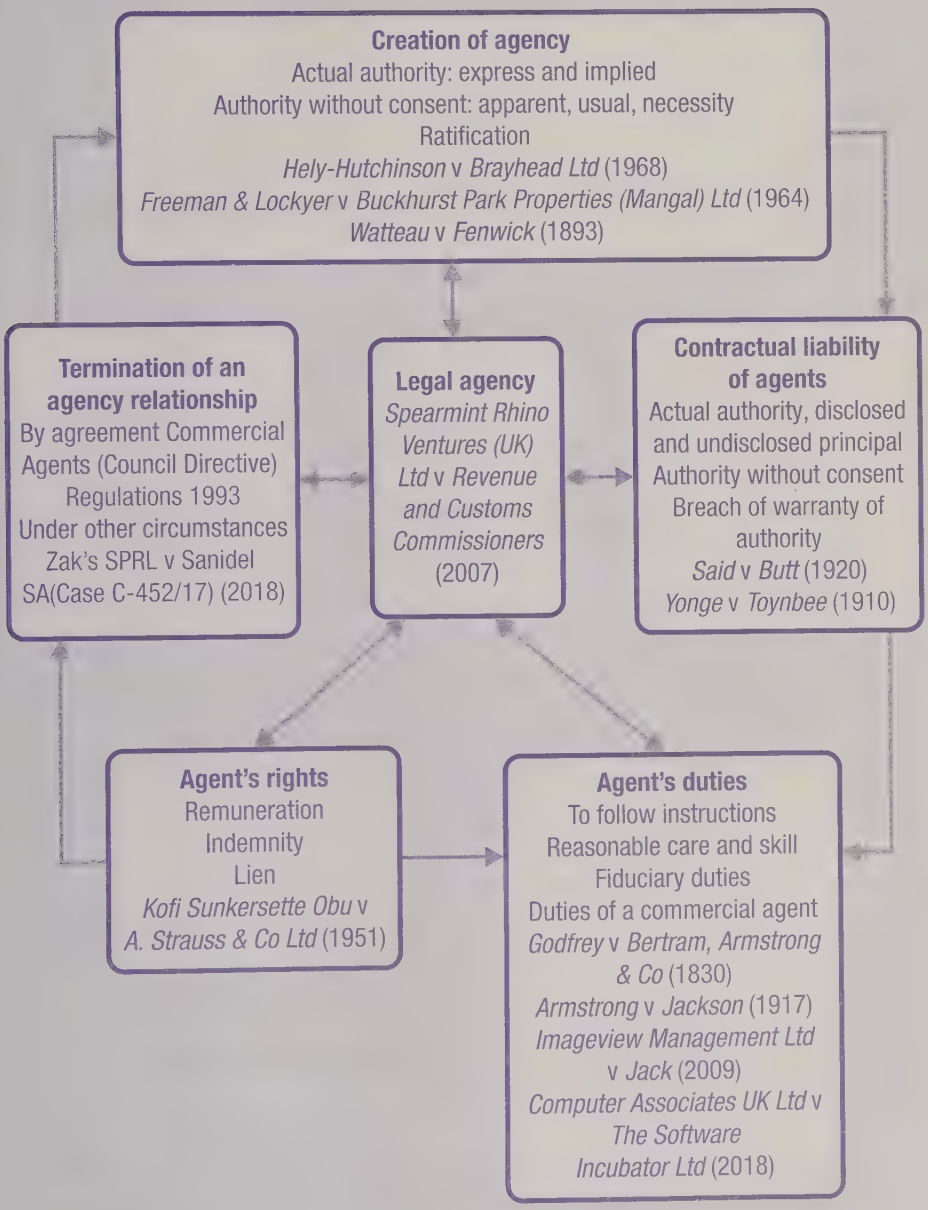
Agency law

Revision checklist

Essential points you should know:

- Various definitions of agency
- The way in which an agency is created
- The extent of an agent's liability in contract
- Duties of an agent
- Rights of an agent against the principal
- Methods of termination of an agency relationship

Topic map


Creation of agency
Actual authority: express and implied
Authority without consent: apparent, usual, necessity
Ratification
Hely-Hutchinson v Brayhead Ltd (1968)
Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd (1964)
Watteau v Fenwick (1893)
Termination of an agency relationship
By agreement Commercial Agents (Council Directive) Regulations 1993
Under other circumstances Zak's SPRL v Sanidel SA(Case C-452/17) (2018)
Legal agency
Spearmint Rhino Ventures (UK) Ltd v Revenue and Customs Commissioners (2007)
Contractual liability of agents
Actual authority, disclosed and undisclosed principal
Authority without consent
Breach of warranty of authority
Said v Butt (1920)
Yonge v Toynbee (1910)
Agent's rights
Remuneration
Indemnity
Lien
Kofi Sunkersette Obu v A. Strauss & Co Ltd (1951)
Agent's duties
To follow instructions
Reasonable care and skill
Fiduciary duties
Duties of a commercial agent
Godfrey v Bertram, Armstrong & Co (1830)
Armstrong v Jackson (1917)
Imageview Management Ltd v Jack (2009)
Computer Associates UK Ltd v The Software Incubator Ltd (2018)

A printable version of this topic map is available from **go.pearson.com/uk/lawexpress**

Introduction

Businesses often use an intermediary to carry out commercial activities on their behalf. Such intermediaries act as agents for a business by marketing products or negotiating contracts for sale or purchase.

However, care should be taken when using the term 'agent' because the law attaches special significance to the relationship of agency. In respect of this relationship, the *principal* has responsibility over the actions of the *agent*, and so anything undertaken by the *agent* will bind the *principal* to compliance with the outcome of any dealings with a *third party*.

Assessment advice

The most likely question on the conceptual analysis of agency is upon the extent of an agent's authority and the effects of any contractual transaction undertaken by an agent while exercising that authority. These notions of agency can be quite complex and call for clear analysis of the various permutations of authority. Plan your answer by first drawing a chart to illustrate the alternating engagement of authority before starting to write, so as to disentangle the relationship between the parties involved.

Legal agency

An agent acts as an appointee of a principal mostly to negotiate contractual relations between the principal and a third party. Recognised agency relationships may include those between directors and their company, or partners and their fellow partners. Quite often people call themselves agents because they sell a certain brand of product which they have purchased from the producer of the brand. This does not constitute a relationship of legal agency, since the product has been bought and sold on by the purchaser – who has acted on his own behalf and not that of the branded producer.

***Spearmint Rhino Ventures (UK) Ltd* v *Revenue and Customs Commissioners* [2007] EWHC 613 (Ch)**

Facts

The defendant (Spearmint Rhino Ventures (UK) Ltd) contested a tribunal decision for the claimant (HMRC) that they had directly supplied the services

of lap-dancers as agents. HMRC held that, by exercising control over service fees that the dancers received from customers – for dances and 'sit-downs' – Spearmint Rhino was liable for consideration of VAT.

Legal principle
Although the dancers paid a trade commission to Spearmint Rhino, they were acting as principals in their own right by separately negotiating whatever fee their services to customers might render. So, the dancers were not engaged as Spearmint Rhino's agents, since they entertained the customer on their own behalf, and were themselves liable to account for VAT for services they performed.

Analysis
As the dancers were deemed to be self-employed because of the full control they exercised over their fee-paying relationship with their clients they were fully liable for payment of VAT.

Impress your examiner

What is made clear by recent case law (see *Kieran Mullin Ltd* v *Customs and Excise Commissioners* [2003] STC 274 and, more pertinently, *Portman Escort Agency* v *Revenue and Customs Commissioners* [2006] STI 2580 UKVAT) is that the degree of control over services to the customer does not have to be a crucial factor in determining whether agency actually exists at all. It now seems that greater emphasis is placed upon the financial accountability of whomsoever performs the service.

Creation of agency

An agent can only act on behalf of a principal if he has the authority in law to do so. How that authority is acquired will determine the extent to which an agent's acts will bind a principal. Authority may be granted with or without the consent of a principal.

Authority with consent

Authority given with consent is often referred to as 'actual authority' and may be express or implied.

Express actual authority

Written or verbal agreements between an agent and a principal denote express, actual authority and the agreement is usually contractual, but need not be. For instance, an agent who agrees to act for no fee provides a gratuitous, rather than contractual, service.

Implied actual authority

Implied actual authority arises out of the relationship between an agent and a principal, or as a result of each other's conduct.

***Hely-Hutchinson* v *Brayhead Ltd* [1968] 1 QB 549**

Facts

Mr Richards was the chairman of a company whose directors allowed him to act as if he was the managing director as well. Without any stated authority, he entered into a contract on behalf of the company to act as a guarantor for a third party's debts. Understandably, the company wanted to avoid the contract of guarantee that Mr Richards had made on its behalf.

Legal principle

The company was bound by the contract, as it had by conduct granted Mr Richards the implied authority of a managing director.

Analysis

This case illustrates the danger of 'turning a blind eye' to an agent who acts without express actual authority of a principal. In order for a principal to avoid liability in such a situation, the act of the agent would have to be expressly forbidden, as stated in the Exam Tip below.

Exam tip

A quote from the case may prove useful in demonstrating your understanding of the concept of implied actual authority. A good example from the *Hely-Hutchinson* case would be that given by Lord Denning: 'It is implied when it is inferred from the conduct of the parties and the circumstances of the case . . . '. In the *Hely-Hutchinson* case, Lord Denning stated that Mr Richards was authorised 'to do all such things as fall within the usual scope of that office'.

It follows from Lord Denning's comments that an agent has the implied authority to do everything necessary to follow the principal's instructions unless, of course, such acts are expressly forbidden to those who are granted actual authority in the first place.

***Waugh* v *H. B. Clifford and Sons Ltd* [1982] 2 WLR 679**

Facts
A firm of builders who were being sued in negligence employed solicitors to defend their case. When the solicitors reached a compromise settlement, the builders instructed the solicitors not to compromise 'at any cost'. These instructions were ignored by the solicitors, who nevertheless entered into a compromise agreement.

Legal principle
Although solicitors, as agents, have implied actual authority to enter into compromise agreements, this does not of course apply when they have been expressly instructed otherwise by their clients.

Analysis
This case illustrates the importance of clearly indicating which acts are expressly forbidden by an agent.

Authority without consent

Authority without consent is also referred to as apparent or ostensible authority.

Apparent authority

Apparent or ostensible authority is not the result of an agreement between an agent and principal, but emerges when a principal indicates to a third party by statement or implication that an agent has the authority to act on behalf of the principal. When a third party gains such an impression from the principal and acts in reliance on that impression, then the principal may be prevented (*estopped*) from denying that the agent has *his* apparent authority.

***Freeman & Lockyer* v *Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480**

Facts
The directors of a company allowed K to act as if he was the managing director. He then engaged a firm of architects on behalf of the company, whom the company refused to pay.

Legal principle
The company was liable because the directors had given the impression that K was empowered to make contracts on the company's behalf. ▶

Analysis
It is important to note Lord Diplock's comments in this case: 'The representation which creates apparent authority may take a variety of forms . . . the commonest is by conduct.'

For apparent authority to operate, three criteria must be satisfied:

- Representation by the principal.
- Reliance on the part of the third party.
- Unawareness on the part of the third party.

Exam tip

Expand your explanation of Lord Diplock's statement on 'representation' in *Freeman & Lockyer* by pointing out that by allowing a person to carry out the executive actions of an agent vicariously, the principal is allowing the third party to assume that the person has 'actual' authority.

Don't be tempted to . . .

Do not assume that the third party has to be disadvantaged by some kind of loss when he acts in reliance on the principal's representation that the agent has actual authority. Actually, the only disadvantage a third party can suffer is by entering a contract as a result of a false impression given by a principal.

Sometimes the court expects a third party to be alerted to an agent's possible lack of authority.

Impress your examiner

Ascertaining the third party's awareness about the limits of an agent's authority can be problematic, because the court sometimes assumes that a third party should, in fact, be alert under certain circumstances to an agent's lack of authority. You need to explain to the examiner that a court will take into account

any behavioural facts as witnessed from a third party's point of view. As it stands, case law cannot predict a third party's awareness about an agent's lack of authority, as indicated by the two cases outlined below.

It is interesting to compare and contrast the decisions in the following cases.

Lloyds Bank Ltd v *Chartered Bank of India, Australia and China [1929] 1 KB 40*

Facts
A bank's employee paid cheques, obtained fraudulently from his employer, into the defendant bank under his own name. The defendant bank claimed they were not liable to reimburse the principal bank for the cheques.

Legal principle
The defendant bank was liable because it should have been 'put on notice' as to the number of fraudulent cheques that happened to be signed by the same employee of the principal bank.

Analysis
The onus was placed on the bank to be vigilant in overseeing its employees' actions while they were acting in the course of employment by undertaking the role ascribed to them as employees by the bank.

First Energy (UK) Ltd v *Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194

Facts
A senior manager, J, at a bank told the claimants that he did not have authority to grant them credit. Thereafter, he falsely told the claimants that Head Office had given their approval for them to be given credit. The bank claimed that they were not bound by the contract made by J because the third party was aware of J's lack of authority.

Legal principle
The bank was bound by the contract made by J. Although the claimants knew that J lacked authority to allow credit, the bank had implied that J did have authority for communicating the bank's decisions to all third parties.

Analysis
The decision in this case appears to be unfair as the subsequent lie and employee's resulting action appear to show an employee acting outside the course of his employment. However the decision is based on the senior status of the manager giving him implied authority to communicate with clients on behalf of the bank. Reynolds (2014) in his article, 'The Ultimate Apparent Authority', 17(6) *The European Law Review* 21, 24 suggests that *First Energy* ignores the rules of apparent authority as it allows an agent to grant himself authority.

Usual authority

There is another kind of *authority* which is an extension of *implied and apparent* authority that does suggest a category of authority in its own right as it is linked to a trade practice as a recognised course of dealing. The following cases provide examples of *usual authority.*

Panorama Developments (Guildford) Ltd v *Fidelis Fabrics Ltd* [1971] 2 QB 711

Facts
A company secretary hired cars for his own use in the defendant's name. Having not been paid, the car hire company (third party) sued the defendant company for payment as they had denied all liability.

Legal principle
The company secretary had *apparent authority* to carry out administrative tasks from which *usual authority* was granted to him for hiring cars as part of his job. Consequently, the company was bound by contracts entered into by the company secretary in pursuance of his recognised role.

Analysis
One could relate this decision to the First Energy case above, by asking was it the usual authority of the role of a senior manager at the bank to communicate Head Office decisions to clients? In this case, the category of usual authority seems to be stretched to its limit. It is interesting to note the comments made in cases such as *Armagas Ltd* v *Mundogas SA (The Ocean Frost)* (1986) AC 717 where Goff LJ stated: 'where a party knows an agent lacks authority . . . the principal will not be bound where the agent wrongly claims to have obtained such authority.' Also, note Sumption LJ's comments in *Kelly* v *Fraser* [2012] 3 WLR 1008. Reynolds (2014) suggests that *First Energy* is inconsistent with *Armagas* and can only be distinguished on the grounds of the agent employee's seniority.

The following case provides an example of usual authority as a category of authority in its own right.

Watteau v *Fenwick* [1893] 1 QB 346

Facts

The owner of a public house sold it to brewers who then retained the former owner as the manager. The manager kept his name as licensee and agreed with the brewers to buy only bottled beer and mineral water. Although this agreement also prohibited the purchase of tobacco products, the manager ordered cigars from a supplier (third party), who then had to pursue the brewers for non-payment.

Legal principle

The brewers were liable as a principal even though they expressly forbade the purchase of tobacco products in the agreement they had with the manager, who himself had no apparent authority (as an agent) since he had not disclosed that he was acting for a principal.

Analysis

This decision is controversial as the principal was undisclosed and the act expressly forbidden and so authority was neither apparent nor implied. It appears to be an example of a principal being made liable to protect a third party against an agent's actions 'come what may'. The principal was held liable because of a trade practice whereby landlords usually purchased tobacco products as agents on behalf of their principals. It is interesting to note the recommendations made by Fridman (1991) in his article 'The Demise of *Watteau* v *Fenwick*', listed at the end of this chapter.

Impress your examiner

In *Watteau* v *Fenwick*, the manager had neither actual express nor implied authority to buy cigars. In fact, he was expressly forbidden to buy tobacco products. What is more, the manager could not claim apparent authority, because the principal – being undisclosed – had never held out that the manager was his agent for this contract. Despite not realising that the manager was an agent, the third party was, however, entitled to assume that the manager had the authority to enter into contracts usual for a person in his position.

Don't be tempted to . . .

Don't assume that the *Watteau* case will always be exercised, since the circumstances in which *Watteau* will apply are restricted to the following criteria:

(1) the agent has no actual authority because he has been forbidden to carry out an act by the principal;

(2) the third party must be unaware of the existence of a principal and think that the agent is acting on his own behalf; and

(3) the agent must make a contract which is usual for an agent in his position.

Agency by necessity

In extreme circumstances the law will either impose an agency relationship on parties or extend an existing relationship to include the following mutually inclusive conditions:

- The agent must be in control of the principal's property.
- Obtaining the principal's instructions would be impossible.
- A real emergency exists.
- The agent must act in good faith.

***Springer* v *Great Western Railway Co* [1921] 1 KB 257**

Facts
A strike at a dockyard delayed the delivery of a consignment of tomatoes. As they had started to perish, the agent felt he had to sell them.

Legal principle
Because the agent could have contacted the principal for instructions, this was not seen as an agency of necessity.

Analysis
The agent had exceeded his authority by assuming an agency of necessity when in fact it was not impossible to contact the principal.

Exam tip

It may be useful to point out that an agency of necessity is less likely to arise these days owing to advanced means of communication that offer agents and principals no excuse for being uninformed about one another's likely reasons for action.

Agency by ratification

Usually, an agent receives the authority to act as an agent of the principal before he so acts. Conversely, the principal's ratification creates a principle of volition subsequent to the agent's action. Moreover, when a principal ratifies an agent's act, the ratification is effective from the date of the agent's act rather than from the date of the ratification. Even so, five conditions need to be satisfied for ratification by the principal to be effective:

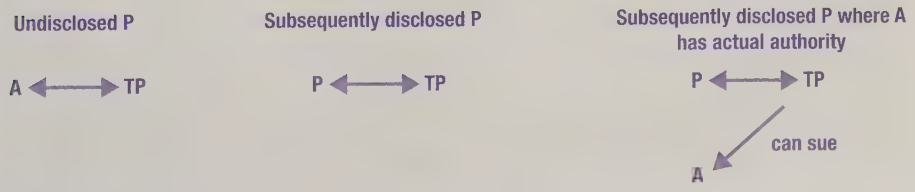
- The agent must claim to be acting for the principal so the principal must be named or be able to be identified, as an **undisclosed principal** cannot ratify an agent's actions.
- The principal must have had full capacity to make the contract at the time of the agent's act. In the landmark case of *Boston Deep Sea Fishing and Ice Co* v *Farnham* [1957] 1 WLR 1051 the court held that ratification of an agent's action by the principal was not possible, because at the time of the agent's action the principal was an enemy alien and therefore lacked the capacity to enter into such a contract.
- At the time of ratification, the principal must either have known all of the material facts or have had every intention of ratifying the action, irrespective of what the facts were.
- A void contract cannot be ratified.
- Ratification must also take place within a reasonable time of the agent's agreement with the third party.

Liability for contracts made by an agent

Actual authority

Where an agent acting on actual authority makes a contract on behalf of a **disclosed principal**, then usually the principal rather than the agent is bound. A principal is disclosed when named or when the agent indicates that he acts on the principal's behalf, whereas a principal is undisclosed when the agent does not reveal that he is acting on behalf of a principal.

If an agent does not disclose that he is acting on behalf of a principal when entering into a contract then the contract will be struck between the agent and the third party, so that each incurs liability towards the other. Once the principal is subsequently disclosed, the third party will incur liability to the principal, and should the agent have actual authority, both agent (A) and principal (P) will be jointly liable to the third party (TP). This can be represented schematically as follows.



Cases where a subsequently disclosed principal cannot sue on a contract

The principal, once disclosed, cannot sue the third party in the following situations:

- Where a relationship of agency is excluded by a contract term.
- Where the third party would not have contracted with the undisclosed principal.
- Where the third party intended to contract with the agent personally.

***Said* v *Butt* [1920] 3 KB 497**

Facts
Said, a theatre critic, wanted to attend the first night of a play. Knowing that the theatre owners would not sell him a ticket, he asked a friend to buy him one. On trying to attend the opening night, Said was refused entry, which left him with no alternative but to sue the theatre owner.

Legal principle
The theatre owner was not liable as a third party to Said because had he known that the ticket was to be given to Said, he would not have sold it to Said's friend – who acted as agent. Therefore, he was within his rights to refuse Said entry.

Analysis
This case allowed the disclosed principal to be selective about who his agent dealt with on his behalf.

In the absence of actual authority

Were an agent to act without actual authority on behalf of an undisclosed principal, no liability will attach to the principal unless the rule of usual authority, as outlined in *Watteau* v *Fenwick*, applies. Of course, ratification does not apply when the principal is undisclosed because the agent does not act as an agent, but acts on his own behalf instead.

Breach of warranty of authority

When an agent falsely informs a third party that he has authority to act for a principal, he may cause the third party to act to his own detriment; in which case, the agent will be liable for breach of warranty of authority. Furthermore, an agent can also be liable for breach of warranty even if he exceeds his authority innocently.

Yonge v *Toynbee* [1910] 1 KB 215

Facts
The principal (Yonge) instructed his solicitor (Toynbee) to defend a case; however, unbeknown to the solicitor, Yonge had become insane.

Legal principle
As soon as the principal was certified as insane, the solicitor had no authority to act for him and so became liable from the time of the principal's insanity for the claimant's costs (third party).

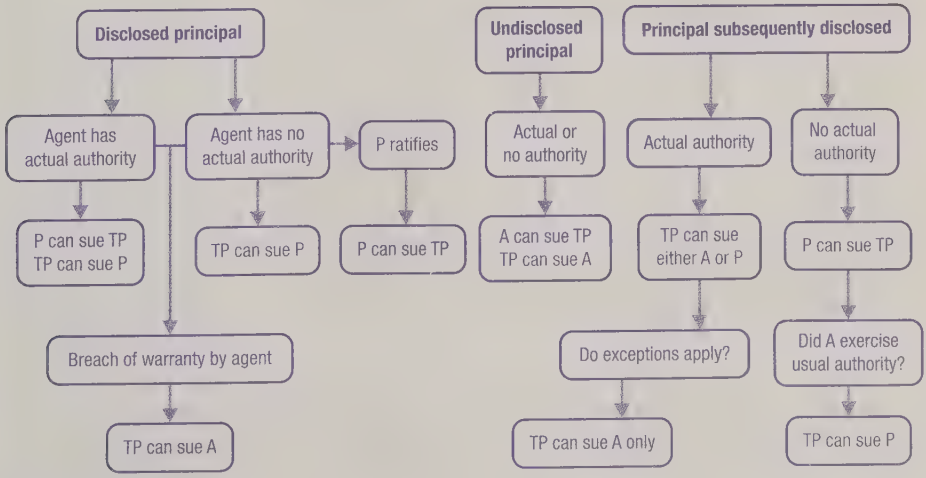
Analysis
The rationale behind this decision was that the principal was unable to give true consent to his agent's actions on his behalf.

Exceptions to agent's liability for breach of warranty of authority

There are three circumstances in which an agent will not be liable for breach of warranty of authority:

- Where the principal ratifies the agent's acts.
- If the third party knew or ought to have known of the agent's lack of authority.
- Where the agent denies having authority or if the third party did not rely on the agent having authority.

Summary of liability on contracts made by agents



Duties of an agent

As the relationship between a principal and agent is based on trust and confidence it is by nature **fiduciary**. There are several duties owed by an agent to a principal that can arise either out of the fiduciary relationship or the agency agreement itself.

Duty to follow instructions

As long as the principal's instructions are clear the agent has to follow them precisely.

Godfrey v *Bertram, Armstrong & Co* [1830] 1 Kn 381

Facts
An agent failed to follow his principal's instructions to sell shares at a certain price because he thought the price would increase. Unfortunately, the share price fell.

Legal principle
The agent was liable and had to pay the principal damages for failing to follow his instructions.

Analysis
The agent should carry out all lawful instructions of the principal and not act on his own behalf.

Duty to use reasonable care and skill

An agent must use reasonable care and skill in carrying out his duties. This is supported by the following implied statutory term.

Supply of Goods and Services Act 1982, s. 13

In a contract for the supply of a service where the supplier is acting within the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.

The degree of care and skill required depends on the expertise an agent claims to possess. For instance, a solicitor acting as an agent will be expected to demonstrate the standard of care and skill reasonably expected of a solicitor.

Fiduciary duties

An agent has three important fiduciary duties:

- To avoid conflicts of interest.
- Not to make secret profits or take bribes.
- To be able to account for any payments received.

Conflicts of interest

An agent should not put himself in a position in which his interest conflicts with his duty. There must be no conflicts between his interests and those of the principal.

> ***Armstrong* v *Jackson*** **[1917] 2 KB 822**
>
> **Facts**
> A stockbroker acting on the instructions of his principal bought 600 shares in a company. As it was, the stockbroker (agent) already owned the 600 shares and merely transferred them to his principal.
>
> **Legal principle**
> Here the stockbroker had placed himself in a position where his duty conflicted with his own interest.
>
> **Analysis**
> The stockbroker (agent) should have disclosed the conflict of interest to the principal. In effect he was making a secret profit.

An agent can avoid a conflict of interest by disclosing the conflict to the principal, thereby giving the principal the opportunity either to appoint another agent, or consent to the agent acting on his own behalf as well as for himself, as in the case of a solicitor who is able to act for both parties in a transaction.

> ***Clark Boyce* v *Mouat*** **[1994] 1 AC 428**
>
> **Facts**
> A solicitor acted for both a mother and son in a mortgage transaction. Actually, the mother had wished to secure a mortgage on her house to give her son a loan.
>
> **Legal principle**
> This arrangement was lawful because a solicitor may act for both parties in a transaction even if the interests of the parties conflict, provided that he gains the informed consent of both parties. ▶

Analysis
It is important to note that in this case the solicitor advised the mother to obtain independent advice, pointing out that she could lose her house, were her son to default on mortgage repayments, so she entered into the arrangement indicating that she was fully aware of the consequences of non-repayment.

Secret profits

A secret profit arises when an agent receives profit over and above that agreed with the principal, while acting for the principal. There are two surreptitious ways in which a secret profit can arise:

- By means of an agent's act alone.
- With the help of a third party in the form of a bribe.

Imageview Management Ltd v *Jack* [2009] EWCA Civ 63

Facts
An agent negotiated the transfer of a goalkeeper, Kevin Jack, to Dundee United for 10 per cent of the player's salary, while at the same time agreeing a separate, undeclared deal with the club for arranging a work permit for the player. Realising that his agent had made a secret profit, the player stopped paying his agent the 10 per cent and sued him for non-disclosure.

Legal principle
The footballer's agent was not entitled to a fee for obtaining a work permit as well as his 10 per cent remuneration, since he had breached his fiduciary duty by making a secret arrangement with the club.

Analysis
Jacob LJ stated that the law places high standards on agents and the agent's own personal interests came 'entirely second to the interest of his client'. To avoid a breach of the duty of good faith, an agent must make full disclosure of any potential profits as well as secure his client's consent for obtaining such.

If an agent takes a bribe from a third party, the principal may countenance certain options. In dismissing the agent, he can recover any commission already paid to the agent. He is also entitled to recover the bribe from the agent or third party and hold it on trust for himself. In addition, instead of recovering the bribe he can sue the agent or third party to remedy his losses and have the contract made with the third party rescinded.

Duty to account

The property of the agent must be kept separate from that of the principal unless the agreement says that both may be mixed. Once more, accurate accounts of any transactions between the parties must be kept by the agent and be available for inspection by the principal.

Duties of a commercial agent

A commercial agent is one who negotiates the sale or purchase of goods for a principal or who acts on the principal's behalf to conclude a contract for sale or purchase of goods. A statutory definition is given below.

Commercial Agents (Council Directive) Regulations 1993, reg. 2(1)

'Commercial agent' means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the 'principal'), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal.

Impress your examiner

A commercial agent is concerned with the sale or purchase of *goods*. In this respect it would be helpful to refer to the original decision in the High Court in *The Software Incubator Ltd* v *Computer Associates Ltd* [2016] EWHC 1587 (QB) where the court held that 'goods' as stated in reg. 2 included software in a digital form because although software is intangible it can only be operated in a tangible manner by means of electronic equipment. It is interesting to note that this decision referred to goods as referred to under the Commercial Agents (Council Directive) Regulations 1993 rather than the Sale of Goods Act 1979 or the Consumer Rights Act 2015. This decision was later reversed by the Court of Appeal.

***Computer Associates UK Ltd* v *The Software Incubator Ltd* [2018] EWCA Civ 518**

Facts

An agent was employed by a principal by a non-exclusive contract to promote software online accessed via a link. The principal terminated the contract on ▶

discovering that the agent had entered into another agency agreement with a competitor whereupon the agent claimed compensation under the Commercial Agents (Council Directive) Regulations 1993. The issue was whether or not digital content could be classified as 'goods' under the Regulations. The applicant appealed on the grounds that the High Court judge was erroneous in giving a wide definition of goods using the same definition as that given under s. 2(1) SGA 1979.

Legal principle

The Court of Appeal unanimously reversed the High Court's decision that digital content should be included under the s. 2(1) definition of goods; hence the Regulations did not apply. However, as the agency agreement was not exclusive, it had not been breached under common law and so the agency was entitled to damages under common law for wrongful repudiation by the principal.

Analysis

In both UK and EU law, it is clear that only tangible property can be categorised as goods under both the Sale of Goods Act 1979 and the Commercial Agents (Council Directive) Regulations 1993. Any software that is not supplied on a physical medium is therefore intangible property. While the court did recognise the illogicality of determining the status of software by its method of delivery, it left it to the legislature to resolve this issue.

In acting on behalf of a principal, the commercial agent must act dutifully and in good faith. In carrying out such duties, the agent must make every effort to negotiate and if necessary conclude transactions as reasonably instructed by the principal, as well as communicate to the principal all necessary information.

Rights of an agent against a principal

Apart from having obligations towards a principal, an agent is entitled to demand the right to remuneration, or to be indemnified, and hold the right to impose a lien on the principal's property.

Remuneration

The right to receive remuneration arises only if there is an express or implied term in the agent's contract. Such a term is implied by statute.

Supply of Goods and Services Act 1982, s. 15

(1) Where under a contract for the supply of a service, the consideration for the service is not determined by contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge.

(2) What is a reasonable charge is a question of fact.

Exam tip

Take the opportunity to explain and comment upon this section by stating that it operates where a contract is silent about payment or about the method of payment for a service, leaving it to be determined by course of dealing or trade practice. You may wish to observe that the use of the word 'reasonable' in s. 15(1) will be linked to parties' expectations in light of the transaction in question. Also, s. 15(2) is less than helpful in that it adds an element of unpredictability to assessing suitable remuneration by always making it case-specific.

Any express term about the amount of remuneration contained within an agency contract will, of course, supersede an implied term, even that of s. 15.

Kofi Sunkersette Obu v *A. Strauss & Co Ltd* [1951] AC 243

Facts
An agency contract contained an express term outlining the level of remuneration to the agent as well as a term saying that extra remuneration was payable as commission *at the principal's discretion.* In the event, the principal refused to pay the agent commission.

Legal principle
The agent was not entitled to receive commission because the contract contained an express term stating that it was payable at the principal's discretion.

Analysis
Hence an express term on remuneration overrides any implied term about payment of commission.

Don't be tempted to . . .

Don't assume that although an express term may specify an amount of remuneration, a term can be implied into a contract to ensure fulfilment of a transaction so that an agent receives due payment. The following case refused to imply such a term into an agency agreement.

Luxor (Eastbourne) Ltd v *Cooper* [1941] AC 108

Facts

An estate agent was promised by the vendor (principal) of two cinemas a £10,000 commission on completion of sale so long as they found suitable buyers. The agent duly found two suitable buyers, but the vendor changed his mind and refused to complete. The agent sued the vendor (principal) for breach of an implied term that stipulated that he would allow the sale to be completed.

Legal principle

The term could not be implied as the inflated commission was payable on completion of the sale rather than on the introduction of prospective buyers.

Analysis

The court also refused to imply the promise of the generous commission on finding suitable buyers into the contract as an express term because part of an estate agent's practice is to accept the risk of losing a sale before completion.

Impress your examiner

Perhaps the above decision would have been different if the express term had stated that £10,000 would have been payable on finding a prospective purchaser willing to complete the sale (whether or not the vendor was willing to proceed). See *Dashwood (formerly Kaye)* v *Fleurets Ltd* [2007] EWHC 1610 QB.

Indemnity

In the absence of an alternative agreement an agent is entitled to be indemnified for liability of his agency business. This right is lost should he exceed his duty or act negligently.

Lien

In the event of a breach of the agency contract by the principal, the agent can hold on to but not sell or dispose of any of the principal's goods that are in his possession. It is worth noting that a lien cannot be exercised by the agent if it is forbidden by the agency contract.

Termination of an agency agreement

When a principal ends the agreement between himself and his agent, it will inevitably have an effect upon third parties who deal with the agent. Although a principal can withdraw authority from the agent at any time, if he does so, he must inform the third party as well, to avoid giving the impression that the agent has apparent authority to act on his behalf. There are various ways in which an agency agreement can be ended.

Termination by agreement

Non-contractual agency agreements can be terminated at any time. However, the termination of a contractual agreement will depend on whether or not the agreement is for a fixed term. Fixed-term agreements will automatically expire once the fixed term for their duration has lapsed. Nevertheless, it is often the case that agency agreements do not stipulate a time period, in which situation there are two possible methods of termination:

- Implication of automatic termination by reference to trade custom.
- Termination by reasonable notice.

Impress your examiner

Point out that although the term 'reasonable notice' is case-specific, the Commercial Agents (Council Directive) Regulations 1993 do stipulate minimum requirements for reasonable notice (see below).

Termination under the Commercial Agents (Council Directive) Regulations 1993

According to reg. 15, minimum notice periods apply to agencies of indefinite duration as shown in Table 10.1.

Table 10.1 Minimum notice periods

Length of agency	Minimum notice period
Up to one year	One month
Up to two years	Two months
After two years	Three months

Note: These notice periods do not apply when the contract is terminated on account of either party's breach or in exceptional circumstances.

Obviously, the principal and agent can agree to longer periods of notice if needs must. It is interesting to note that the above minimum periods of notice will also apply where an agency agreement has continued even after expiry of a fixed term.

Compensation and indemnity under the Regulations (reg. 17)

Either compensation or indemnity is payable to a commercial agent on termination of the agreement, but unless the agent chooses indemnity, compensation will be awarded as a matter of course.

Compensation

Regulation 17(6) states that compensation is available for damage suffered as a result of termination of the agreement. This could include damage due to loss of commission expected from performance of the contract.

Indemnity

Indemnity is based on the benefits given by the agent to the principal as explained in reg. 17(3).

Commercial Agents (Council Directive) Regulations 1993, reg. 17(3)

. . . the commercial agent shall be entitled to an indemnity if and to the extent that –

(a) he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and

(b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.

The amount of indemnity cannot exceed the agent's average annual commission paid over the previous five years (reg. 17(4)).

***Zako SPRL* v *Sanidel SA (Case C-452/17)* [2018] All ER (D) 112**

Facts
S agreed that a manager employed by Z could work from their premises selling kitchens as well as managing staff and arranging kitchen measurements. Z claimed that the agreement between the two businesses was a commercial agency and under the Regulations they were entitled to compensation and indemnity rights were the agency to end. S claimed that the agreement was a contract for services rather than a commercial agency and that Z's manager did work unrelated to the negotiation and closure of sales and therefore just operated from their premises.

Legal principle
The arrangement was that of a commercial agency, even though the manager carried out administrative tasks and work other than sales negotiation and closure.

Analysis
A commercial agency existed as it can exist where an agent operates out of the principal's premises even if the arrangement does not prevent the agent from carrying out work independent of the principal.

Loss of the right to compensation and indemnity (reg. 18)

The right to compensation and indemnity is lost in the following situations:

- On justifiable termination of the contract by the principal for breach by the agent.
- Where the agent, having full mental and physical capacity, terminates the contract in the absence of breach by the principal.
- Where the agent, with consent of the principal, assigns his duties to another agent.

Termination in other circumstances

Automatic termination of the agency contract will take effect in the following cases:

- Frustration of contract.
- Death of either party.
- Insanity of either party.
- Bankruptcy of the principal.
- Bankruptcy of the agent – where it interferes with his ability to act for the principal.

Putting it all together

Sample question

Could you answer this question? Below is a typical problem question that could arise on this topic. Additionally, a sample essay question and guidance on tackling it can be found on the companion website.

Problem question

Pat owns a health club and employs Al as her general manager. Al's duties include ordering supplies for the club including food and drink for the bar. Pat also allows several fitness instructors to use her facilities to run classes. All of the instructors use the equipment provided by the club, although they are not required to wear the club uniform. Pat pays the instructors according to the number of weekly classes they hold. Advise Pat as to her liability for payment in the following situations:

(a) She has received a demand from Her Majesty's Revenue and Customs for payment of VAT for services provided by her fitness instructors.

(b) TP Supplies Ltd has sent Pat an invoice for payment of £500 for the supply of nuts and crisps for the bar. On enquiring who had ordered these supplies, Pat discovered that it was Al, despite being given strict instructions to buy only fresh fruit and healthy food for the bar. Al was also instructed not to buy nuts in view of possible allergies on the part of customers.

Answer guidelines

Approaching the question

This question assesses your knowledge and understanding of two areas of agency: (a) the legal existence of an agency relationship; and (b) the nature of authority granted to an agent by the principal.

Important points to include

In part (a) you should highlight the difficulty in establishing whether or not an agency relationship exists. VAT cases such as *Kieran Mullin* v *Customs & Excise Commissioners* (2003) and *Spearmint Rhino Ventures (UK) Ltd* v *Revenue & Customs Commissioners* (2007) provide ample material for your analysis.

In part (b) you need to explain the principle of actual authority, implied actual authority and usual authority arising out of apparent authority (*Panorama Developments (Guildford) Ltd* v *Fidelis Furnishing Fabrics Ltd* (1971)).

You should also address the effects of the contract in view of the fact that the principal in this case is unlikely to ratify the agreement.

Impress your examiner

For part (a), point out that recent case law makes it very clear that the fact that a principal exercises a high degree of control over the purported agent does not necessarily indicate a relationship of agency. You could also suggest that in the scenario, if the fitness instructors negotiate their own fees with Pat, then they could be seen as acting on their own behalf. You may well wish to question the policy behind decisions such as those given in *Kieran Mullin* and *Spearmint Rhino.* As regards part (b), when discussing apparent authority, you should analyse cases like *Lloyds Bank Ltd* v *Chartered Bank of India, Australia and China* (1929) to ascertain whether or not TP Supplies Ltd should have been alert to Al's lack of authority to buy unhealthy or allergy-inducing snacks for a health club.

Key case summary

Key case	How to use	Related topics
Spearmint Rhino Ventures (UK) Ltd v *Revenue and Customs Commissioners* [2007] EWHC 613 (Ch)	To distinguish between agent and principal status	Bilateral agreement between parties
Hely-Hutchinson v *Brayhead Ltd* [1968] 1 QB 549	To give an example of implied actual authority by conduct	Implied terms, e.g. *Attorney General of Belize* v *Belize Telecom Ltd* [2009] UKPC 10
Waugh v *H. B. Clifford and Sons Ltd* [1982] 2 WLR 679	To explain the use of implied authority by an agent to ignore a principal's express instructions	Implied terms
Freeman & Lockyer v *Buckhurst Park Properties Ltd* [1964] 2 QB 480	To illustrate how a company's denial of apparent authority can be estopped	Misrepresentation

Key case	How to use	Related topics
Lloyds Bank Ltd v *The Chartered Bank of India, Australia and China* [1929] 1 KB 40	To explain a third party's liability where they are deemed to be put on notice as to an agent's lack of authority	Implied terms
First Energy (UK) Ltd v *Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194	To show that even where a third party is alerted to agent's lack of authority the principal may still be liable for agent's acts	Implied terms as to authority of agent
Panorama Developments (Guildford) Ltd v *Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711	To give an example of usual authority arising out of apparent authority	Implied terms as to authority of agent
Watteau v *Fenwick* [1893] 1 QB 346	To demonstrate the operation of usual authority	Course of dealing as a reference point to determine liability
Springer v *Great Western Railway Co* [1921] 1 KB 257	To show when an agency of necessity arises	Acting in good faith
Said v *Butt* [1920] 3 KB 497	To explain when a principal cannot sue a third party	Intention to create legal relations
Yonge v *Toynbee* [1910] 1 KB 215	To illustrate how a breach of warranty of authority can arise	Implied terms as to agent's authority
Godfrey v *Bertram, Armstrong & Co* (1830) 1 KN 381	To point out an agent's duty to follow the principal's instructions	Breach of contract
Armstrong v *Jackson* [1917] 2 KB 822	To demonstrate what constitutes an agent's conflict of interest	Breach of fiduciary duty and good faith principles
Clark Boyce v *Mouat* [1994] 1 AC 428	To indicate when conflict of interest may occur with consent of both principal and third party	Intent and consent to an agreement

Key case	How to use	Related topics
Imageview Management Ltd v *Jack* [2009] EWCA Civ 63	To give an example of an agent making a secret profit	Misrepresentation by silence. Breach of principles of good faith
Computer Associates UK Ltd v *The Software Incubator Ltd* [2018] EWCA Civ 518	To explain the meaning of 'goods' under both the Sale of Goods Act 1979 and the Commercial Agents (Council Directive) Regulations 1993	Sale of Goods Act 1979 s. 2(1)
Kofi Sunkersette Obu v *A. Strauss & Co Ltd* [1951] AC 243	To illustrate when an express term on remuneration overrides an implied term	Express and implied terms
Luxor (Eastbourne) Ltd v *Cooper* [1941] AC 108	To show when a court will refuse to imply a term into a contract	Implied terms
Zako SPRL v *Sanidel SA (Case C-452/17)* [2018] All ER (D) 112	To clarify the situations in which a commercial agency rather than a contract for services can exist	Definition of an agent

Key further reading

Key articles/reports	How to use	Related topics
Brown, I. (1995) The Agent's Apparent Authority: Paradigm or Paradox, *Journal of Business Law* 360.	To discuss the case of *First Energy (UK) Ltd* v *Hungarian International Bank Ltd*	Types of agents' authority
Dowrick, F. E. (1954) The Relationship of Principal and Agent, 17 *Modern Law Review* 24.	To explain and critically examine the main rules of law governing the relationship between principal and agent	Rights, duties and powers of those acting as agents

Key articles/reports	How to use	Related topics
Flannigan, R. (2008) The (Fiduciary) Duty of Fidelity, 124 *Law Quarterly Review* 274.	To explain how fiduciary duty has been re-defined as duty of fidelity in case law	Fiduciary relationships in positions of trust
Fridman, G.H.L. (1991) The Demise of *Watteau* v *Fenwick*: *Sign-O-Life Ltd* v *Metropolitan Life Insurance Co*, 70 *Can Bar Rev* 329.	To suggest that *Watteau* v *Fenwick* is now defunct and recommend adopting the decision of the Canadian courts in *Sign-O-Life*	The development of authority of those acting as an agent
Reynolds, F.M.B. (2014) The Ultimate Apparent Authority, 17(6) *The European Law Review* 21, 24.	To discuss the relationship between *First Energy (UK) Ltd* v *Hungarian International Bank Ltd* and *Armagas Ltd* v *Mundogas (The Ocean Frost)*	The extension of apparent authority

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11

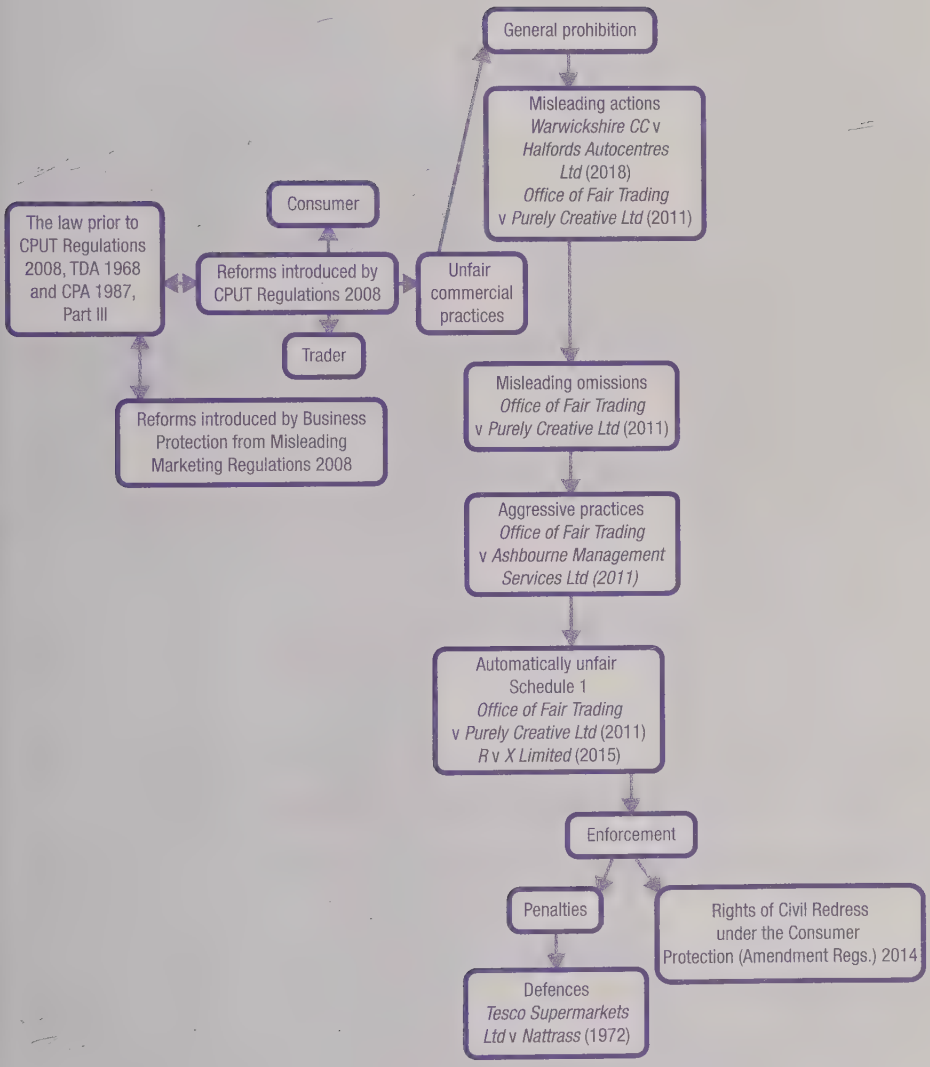
Liability for unfair trading practices

Revision checklist

Essential points you should know:

- The aims of the Unfair Commercial Practices Directive 2005/29/EC (UCPD)
- What constitutes an unfair commercial practice under the Consumer Protection from Unfair Trading Regulations 2008 (CPUTR)
- The range of defences offered to a trader under CPUTR 2008
- The degree of protection offered to businesses from unfair trading practices

Topic map


General prohibition
Misleading actions
Warwickshire CC v *Halfords Autocentres Ltd* (2018)
Office of Fair Trading v *Purely Creative Ltd* (2011)
Consumer
The law prior to CPUT Regulations 2008, TDA 1968 and CPA 1987, Part III
Reforms introduced by CPUT Regulations 2008
Unfair commercial practices
Trader
Reforms introduced by Business Protection from Misleading Marketing Regulations 2008
Misleading omissions
Office of Fair Trading v *Purely Creative Ltd* (2011)
Aggressive practices
Office of Fair Trading v *Ashbourne Management Services Ltd (2011)*
Automatically unfair Schedule 1
Office of Fair Trading v *Purely Creative Ltd* (2011)
R v *X Limited* (2015)
Enforcement
Penalties
Rights of Civil Redress under the Consumer Protection (Amendment Regs.) 2014
Defences
Tesco Supermarkets Ltd v *Nattrass* (1972)

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Introduction

The law of unfair trading is concerned with protecting the interests of honest customers and traders, by imposing criminal sanctions, enforceable by public authorities, on traders who offer a sub-standard service.

Needed reform has bolstered criminal liability for unfair trading practices by introducing new offences under the Consumer Protection from Unfair Trading Regulations 2008 (CPUTR). The Regulations also enable enforcement authorities to obtain enforcement orders, thereby avoiding the requirement for a prosecution.

Assessment advice

Essay questions

For this type of question, endeavour to explain and comment on any of the main concepts introduced by the Consumer Protection from Unfair Trading Regulations. For more in-depth analysis, distinguish between key provisions of the Trade Descriptions Act 1968 and the Consumer Protection from Unfair Trading Regulations.

Problem questions

A problem question is likely to expect you to apply the provisions of the Consumer Protection from Unfair Trading Regulations to a case scenario. As yet, there is no case law emanating from the new Regulations, so you will need to show detailed knowledge of these provisions and their possible implications for future cases.

Law before the Consumer Protection from Unfair Trading Regulations 2008

Before the introduction of the 2008 Regulations it was recognised that many customers were reluctant to enforce their civil rights against traders who made false or misleading descriptions of goods or services. Consumers and even businesses often lacked the sheer tenacity to pursue a civil remedy because of the cost, delay and complexity of dispute procedures. This allowed unscrupulous traders to get away with low standards of service. The Trade Descriptions Act 1968 (TDA) protected both consumers and businesses from false and misleading descriptions by imposing *criminal* sanctions on 'rogue traders'. Misleading pricing was provided for under Part III of the Consumer Protection Act 1987 (CPA). Both of these Acts have now been abrogated by the Consumer Protection from Unfair Trading Regulations 2008, which introduced consumer protection measures against a wider range of unfair trading practices.

Offences under the Trade Descriptions Act 1968

The Act created two strict liability offences under s. 1 that applied to traders making false or misleading descriptions about products (see Table 11.1). Services were covered by s. 14 which unlike s. 1 required a degree of *mens rea* in the form of knowledge or recklessness.

Table 11.1 False statements

False statements about goods	False statements about services
Section 1(1): Any person who in the course of any trade or business – (a) applies a false trade description to any goods; or (b) supplies or offers to supply any goods to which a false trade description is applied: shall . . . be guilty of an offence	Section 14(1): It shall be an offence for any person in the course of any trade or business – (a) to make a statement which he knows to be false; or (b) recklessly make a statement which is false; as to . . . (i) The provision in the course of any trade or business, of any services.

The intention required in ss. 1 and 14 TDA 1968

Liability was strict in s. 1(1)(a) inasmuch as a trader committed an offence just by innocently applying a false description to a product, as there were no defences at all. However, defences of due diligence including mistake, reliance on information provided by another, or on the act or default of another or some other event beyond control of the trader was available under s. 24 for breaches of s. 1(1)(b), but only on proof of a lack of intent to apply a false description. Moreover, these defences were also available to a trader who falsely described a service under s. 14.

Misleading pricing under the Consumer Protection Act 1987, Part III

According to s. 20 CPA 1987, an offence was committed when a trader, in the course of a business, gave a misleading indication to a consumer about the price of goods, services, accommodation or facilities. A defence of due diligence, similar to s. 24 TDA 1968, was provided by s. 39 CPA 1987.

Reform

The Consumer Protection from Unfair Trading Regulations 2008 revoked the Control of Misleading Advertisements Regulations 1988, and superseded much of the law in TDA 1968, including Part III CPA 1987. All of the previous offences under TDA 1968 and Part III CPA 1987 have been subsumed into the concept of *unfair trading practices* which include unfair actions, unfair omissions, aggressive practices, practices under a general prohibition and practices which are automatically deemed to be unfair.

Reforms introduced by the Consumer Protection from Unfair Trading Regulations 2008

These Regulations implemented the Unfair Commercial Practices Directive 2005/29/EC, which aims to control unfair commercial practices in business-to-consumer dealings only, unlike TDA 1968, which covers business-to-business transactions as well. Another aim of the Directive is to seek maximum harmonisation to ensure that a common standard is set for all by equal legal provision within Member States of the EU.

Key concepts in the CPUTR 2008

Certain new concepts were introduced by these Regulations and are defined in reg. 2(1). The most significant are: 'consumer', 'average consumer', trader, 'commercial practice', material distortion of economic behaviour, 'product', professional diligence and 'transactional decision'.

Consumer

A consumer is defined as a natural person who acts for purposes outside his business. The 'European' definition discards any idea of consumer status being conferred upon a business as a way of dealing.

The average and vulnerable consumer according to reg. 2(2)–(6)

An average consumer is a natural person who is defined in reg. 2(2) as being 'reasonably well-informed, reasonably observant and circumspect'. Allowance is made for targeted groups and vulnerable consumers by means of reg. 2(4) and (5) respectively (Table 11.2).

Table 11.2 Targeted groups and vulnerable consumers

Targeted consumer: reg. 2(4)	Vulnerable consumer: reg. 2(5)
Where the practice is directed to a particular group of consumers . . . the average consumer shall . . . refer to the average member of that group	(a) where a clearly identifiable group of consumers is particularly vulnerable to the practice . . . because of their mental or physical infirmity, age or credulity in a way . . . the trader could reasonably be expected to foresee; and (b) the practice is likely to materially distort the economic behaviour only of that group . . . the average consumer shall be . . . the average member of that group.

Don't be tempted to . . .

Don't overlook the fact that the term 'average consumer' is open to interpretation as the perception and expectations of one consumer may differ from those of another. In Chapter 1, the *Lloyd Schuhfabrik Meyer* case took into account average consumer perceptions and expectations in light of the description given to a shoe trade mark, and the context in which it was marketed. In making these kinds of assessment no consideration is given to a person's nature in the process of being a consumer.

Impress your examiner

The vulnerable consumer must belong to a targeted group that is clearly identified as 'vulnerable' to the product and the manner in which it is marketed. A vulnerable consumer, who happens to be a member of a group of targeted average consumers, will be judged by the reaction of those average consumers. In other words, no allowance will be made for his vulnerability. So, the vulnerable consumer will be adjudged to be 'reasonably well-informed, observant and circumspect'.

Trader

The definition for trader given in reg. 2 seems to match the interpretation of the concept 'in the course of a business', submitted by the court in *Stevenson* v *Rogers* (see Chapter 1). The reg. 2 definition includes any natural or legal person acting for purposes relating to his trade, business, craft or profession.

Impress your examiner

It is interesting to note that the *Stevenson* v *Rogers* interpretation of 'trader' which supports the definition in reg. 2 differs from that applied to the former Trade Descriptions Act 1968 definition in *Davis* v *Sumner* [1984] 1 WLR 1301, which required a regular course of dealing.

Commercial practice

Consumer Protection from Unfair Trading Regulations 2008, reg. 2(1)

A commercial practice includes:

. . . any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader . . . directly connected with promotion, sale or supply of a product to or from consumers, whether before, during or after a commercial transaction . . .

Any advertising or marketing which is done *before, during or after* the transaction counts as a commercial practice. So, a commercial practice can include advertising or marketing *after* a commercial transaction, unlike TDA 1968, where, in order to establish whether or not a false statement was an offence, there had to be a false or misleading description before or at the time of the commercial transaction.

Unfair commercial practices

Five types of commercial practice are unfair according to the Regulations listed in Table 11.3.

General prohibition under reg. 3(3)

To be seen as *unfair* a commercial practice has to 'contravene the requirements of *professional* diligence', which is defined as the standard of special skill and care which

Table 11.3 Unfair commercial practices

Regulation number	A commercial practice is unfair if it:
reg. 3(3): The General Prohibition	(a) contravenes the requirements of professional diligence; and (b) materially distorts (or is likely to distort) the economic behaviour of the average consumer towards the product;
reg. 5	(c) is a misleading action;
reg. 6	(d) is a misleading omission;
reg. 7	(e) is aggressive; or
Sch. 1	(f) is listed on the 'black list' as always considered unfair in all circumstances.

a trader may reasonably be expected to exercise towards consumers, commensurate with either:

(a) honest market practice in the trader's field . . . ; or

(b) the general principle of good faith in the trader's field . . .

'Honest market practice' has to be interpreted within the context of the particular trade, which may not necessarily match *ideal best practice*. For instance, a trader could diligently complete work to a mediocre standard, but not be fully competent in carrying it out.

Impress your examiner

The general principle of good faith is mentioned but not defined in the CPUTR 2008. Neither is it defined in the Consumer Rights Act 2015, which only talks about the 'requirement of good faith' in the context of negotiation of terms between parties of unequal bargaining power (s. 62 (4)). A greater conceptual understanding of what good faith refers to about a person's intentions needs satisfying, rather than it just being the outcome of the parties' trading behaviour. While being unfamiliar to English law, good faith is a more utilised concept in French and German law and the ECJ may develop a 'harmonised' European concept of good faith accordingly.

A commercial practice is also seen as unfair if it *materially distorts . . . the economic behaviour of the average consumer.* This would involve an impairment of the average consumer's ability to make an informed decision, thereby causing him to take a transactional decision that he would not have taken otherwise (see reg. 2(1)).

Distortion of the consumer's economic behaviour is a key factor in determining whether a commercial practice is considered to be unfair. Hence, while practices like bribes, incentives and heavy persuasion may be unconscionable, they will not be seen as unfair, unless they actually distort the average consumer's behaviour.

Don't be tempted to . . .

Be sure not to overlook the consumer's reaction to the unfair trading practice. It is the *economic behaviour* of the average consumer that must be distorted materially. Much depends on *how the consumer reacts* to the trader's unfair trading behaviour. If the consumer does not react to a trader's serious deception, then the trading practice is not seen as unfair and so no offence is committed. Because the behaviour of the consumer is the focus, were a trader to make a trivial deception, either recklessly or deliberately, and cause an average consumer to enter into a transaction, they would be liable for an unfair trading practice. The trader's state of mind in an unfair trading practice is therefore irrelevant.

Consumer Protection from Unfair Trading Regulations 2008, reg. 2(1)

Any decision taken by a consumer, whether it is to act or to refrain from acting concerning:

(a) whether, how and on what terms to purchase, make a payment in whole or in part for, retain or dispose of a product; or

(b) whether, how and on what terms to exercise a contractual right in relation to a product.

Taking a transactional decision under reg. 2(1)

Taking a transactional decision involves the average consumer acting in reliance on the goodwill of the trader. An unfair commercial practice is detrimental to a consumer in the absence of the trader's goodwill. In the TDA 1968, there was no need to show any transactional decision on the part of the customer, as a trader was liable for making a false or misleading description, *per se.*

Misleading actions under reg. 5

There are two ways in which an action can be misleading if it causes (or is likely to cause) an average consumer to take a transactional decision he would otherwise not have taken (see Table 11.4).

Table 11.4 Misleading actions under reg. 5

1. Regulation 5(2)	2. Regulation 5(3)
The commercial practice contains false information about one or more specified matters or it deceives (or is likely to deceive) an average consumer about one or more specified matters, i.e.: • existence or nature of product • main characteristics of product • extent of trader's commitments • price or manner in which price is calculated • need for a service, part, replacement or repair • nature, attributes, rights of trader(s)/ agents • consumer rights.	By means of marketing practices which either create confusion with any of the products of a competitor, or relate to breach of a code of conduct which the trader has adopted

Warwickshire CC v *Halfords Autocentres Ltd & Competition and Markets Authority* [2018] EWHC 3007 (Admin)

Facts

In February 2017 a Trading Standards officer from Warwickshire County Council booked a vehicle in for servicing at a branch of Halfords. The vehicle had a deliberately created fault. Without knowing that the customer was a Trading Standards officer, Halfords serviced the vehicle, charging the full price. Upon examination, the Trading Standards officer found that the fault had neither been repaired nor reported by Halfords. Accordingly the Council prosecuted Halfords for a breach of reg. 5 under CPUTR 2008. At first instance, the District Judge in the magistrates' court held that as Halfords was not a consumer, they had not engaged in a commercial practice under CPUTR 2008. The Council appealed to the Divisional Court.

Legal principle
The court overturned the decision of the District Judge, stating that despite the Trading Standards officer not acting as a consumer, his conduct was a commercial practice as he was acting in the interests of the consumer.

Analysis
This decision gives a wide interpretation to the definition of a commercial practice in order to offer full protection to potential consumers. It did not matter that the purchaser was not a consumer if the purchase was generally promoted in the interests of consumer protection. The court stated that the District Judge's original decision had the potential to undermine the use of test purchases as a means of consumer protection.

Misleading omissions under reg. 6(1)

A commercial practice will be a misleading omission where it causes (or is likely to cause) the average consumer to make a transactional decision by making omissions as outlined in Table 11.5.

Table 11.5 Misleading omissions under reg. 6(1)

Examples of misleading omissions under reg. 6(1)	Factors to take into account when determining unfairness of the practice
• Omission/hiding of material information • Provision of unclear, unintelligible, ambiguous or untimely information • Failure to identify commercial intent	• Any limitations of the medium used to communicate the commercial practice • If communication medium is limited, what steps were taken to use other means • All features/circumstances of the commercial practice.

Material information

Material information includes any information needed by the average consumer to make a decision to enter into a transaction, as well as any information needed as commercial communications as a result of a Community obligation, for example, the Electronic Commerce (EC Directive) Regulations 2002 (see Chapter 6). In the case

of an invitation to purchase, the material information should include the following specific criteria:

- Main features of the product.
- Trader's identity.
- Geographical address of the trader.
- Either the price including taxes or the way in which the price is calculated.
- All additional freight, delivery or postal charges or a warning that they will be payable.
- Arrangements for payment, delivery, performance and complaints handling, should professional diligence not be exercised.
- The existence of rights of withdrawal or cancellation.

Exam tip

One of the aims of the Unfair Commercial Practices Directive 2005/29/EC is to ensure that consumers are equipped with sufficient information to make informed choices when considering a purchase. With this in mind, highlight areas within the CPUTR 2008 to illustrate how any of the aims of the Directive have been implemented. This will show that you are aware of the policy underpinning the Directive and have an ability to relate this policy to the Regulations.

Regulation 6, therefore, seems to apply to all forms of material omissions of information including details about the trader's poor past or present performance.

Aggressive commercial practices under reg. 7(1)

A commercial practice will be seen as 'aggressive' when a trader uses harassment, coercion or undue influence so that the consumer's ability to act is (or is likely to be) significantly impaired. The practice must cause the average consumer to take a transactional decision as defined in reg. 2(1) for it to be seen as unfair. Although definitions of *coercion* and *undue influence* are given in reg. 7(3), the Regulations fail to define *harassment.*

Consumer Protection from Unfair Trading Regulations 2008, reg. 7(3)

(a) 'coercion' includes the use of physical force; and

(b) 'undue influence' means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.

Impress your examiner

Neither of these terms is defined in the UCPD 2005, but at least they have been partially addressed in the CPUTR 2008. In the absence of a definition of 'harassment' within the Regulations a court may resort to existing statutes like the Protection from Harassment Act 1997, which provides sanctions for 'stalking' offences. It is interesting to note that this Act carries similar penalties to those in reg. 11.

Guidelines for establishing harassment, coercion or undue influence

Despite the absence of a definition for all three types of aggressive trading practices, reg. 7(2) offers guidelines on factors to be taken into account when determining when harassment, coercion or undue influence might have taken place. These factors include:

- timing, location or persistence.
- threatening/abusive language or behaviour.
- exploitation by the trader of any specific misfortune, so as to impair the consumer's judgement and influence their decision.
- onerous or disproportionate non-contractual barrier regarding the consumer's rights under the contract.
- threat of legal action when none can legally be taken.

***Office of Fair Trading* v *Ashbourne Management Services Ltd* [2011] EWHC 1237**

Facts

A gym management company was demanding payment of membership fees under threat of reporting non-payers to credit reference agencies even though the company was in dispute with members about minimum membership periods and availability of certain exercise classes.

Legal principle

Such behaviour was contrary to reg. 3(3), the General Prohibition, reg. 5 as a misleading action and reg. 7(2)(d) as an aggressive commercial practice.

Analysis

The court also found that some of the terms in the standard form agreements were unfair as they required consumers, should they wish to cancel, to pay in full for the remainder of the minimum membership term.

Exam tip

When referring to aggressive practices in your answer it is worth suggesting some practical examples to show that you appreciate what types of behaviour might be categorised under reg. 7. An example of undue influence could be where a mechanic, having done unrequested work on your car, retains it until the unauthorised work is paid for. Harassment may be when a debt collector calls you at unsocial hours or uses threatening behaviour to recover the debt.

Commercial practices unfair in all circumstances under Sch. 1

Trading practices that are always unfair, whatever the circumstances, are contained as a 'black list' in Sched. 1. As there are 31 outright banned practices they are too numerous to list, but the most important include:

- falsely displaying a quality mark or equivalent.
- lying about being a signatory to a code of practice.
- falsely claiming that the trader is about to cease trading.
- falsely saying that a product has a limited time offer.
- presenting rights given in law to a consumer as a distinctive feature of the trader's offer.
- falsely claiming that a product is able to cure illnesses, dysfunction or malformations.
- making persistent, unsolicited telephone calls, emails or faxes unless they are to enforce a contractual obligation.
- asking for unnecessary documents in an insurance claim or failing to correspond on pertinent matters to discourage the consumer from pursuing their claims.
- targeting children in advertisements to get them to buy or to persuade their parents to buy products.
- informing consumers that if they do not buy the product or service the trader's livelihood will be in jeopardy.
- creating the false impression that the consumer has already won, will win, or will on doing a particular act, win a prize, when in fact there is no prize, or in claiming the prize the consumer will have to spend money or incur a cost.
- demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer (inertia selling).

R v *X Limited* [2013] EWCA Crim 818

Facts

A salesman representing a security company visited the home of a 76-year-old widower and spent over three hours persuading him to buy products and services for just over £2,500. During the visit the salesman produced a document showing burglary statistics for the area. There were several counts of unfair trading practices submitted to the court, one of which, count 1, referred to Para. 12, Sched. 1: '*Making a materially inaccurate claim concerning the nature and extent of risk to the personal security of the consumer . . . if the consumer does not purchase the product.*'

Legal principle

Upholding the appeal by the prosecution from the Crown Court's dismissal of the case as no case to answer, the court held that there was a material distortion of existing crime statistics by the salesman in contravention of Para. 12, Sched. 1.

Analysis

The court also considered whether or not a one-off transaction could constitute a '*commercial practice*' under reg. 3, and stated that although a single failure in respect of one customer may not be sufficient – in this case a failure featured at every stage of the selling process and was therefore sufficient to fall within the definition of an unfair commercial practice.

Unlike the other unfair trading practices covered so far, with Sched. 31 offences there is no requirement for the consumer to be influenced in any way whatsoever by a trader's practice. A trader will be liable automatically for carrying out the unfair trading practice, irrespective of a consumer's reaction.

Office of Fair Trading v *Purely Creative Ltd* [2011] EWHC 106 (Ch)

Facts

Actually, Purely Creative Ltd was just one of many defendant marketing companies in this case, all of whom conducted what is understood to be a standard unsolicited selling ploy for enticing consumers to claim goods following their supposed entry to a fictitious prize draw. Curious consumers could only effectively claim a prize by calling a premium rate telephone number. As is usual, almost all (99.92 per cent) of the allotted codes on letters sent to consumers matched the least expensive prize: which in the case of Purely Creative was an

ersatz 'Zurich' watch. The total cost of the watch to the defendant came to £9.36, whereas the cost incurred to most recipients was about £18.00, which included £9.50 for a six-minute premium rate telephone call, and £8.50 for postage and insurance. In fact, the defendant never bothered to insure the watch at all. There was a cheaper option to apply for by post at £9.50, but to all intents and purposes this was not viable. The defendant received an income of £15.71 from each telephone applicant.

Legal principle

The defendant deliberately created a false impression of prize-winning (contrary to Para. 31, Sched. 1 to the CPUTR 2008), as the consumer was required to pay for a watch by way of a procedure for claiming it. Also, it was not made clear at the outset whether the six-minute premium rate call was a *minimum* or *maximum* amount of time required to claim the prize. As it stood, all telephone calls would cost at least £8.95, anyway. Having promised that £8.50 would cover insurance as well as a fair postage charge, the defendant misled the consumer by failing to insure the watch. Furthermore, the defendant breached reg. 5 by giving a misleading impression that the consumer had been specifically selected to win a prize, when they had not. Further, reg. 6 was breached because no information was given about the probability of winning a higher value prize. As Purely Creative Ltd relied on this kind of sales promotion as a means to market targeted goods, they were naturally unwilling to give the OFT an undertaking to stop these misleading practices. As a result, the OFT was granted an injunction under the Enterprise Act 2002 to ensure that the defendant ceased trading.

Analysis

The case eventually reached the CJEU for a preliminary ruling on the interpretation of Paragraph 31 of Annex 1 to Directive 2005/29/EC and in particular of the expression creating a 'false impression' and whether it included other factors apart from the cost of claiming a prize in comparison with its value. Using a literal interpretation the court held that a false impression (that a consumer has won a free prize) can be created irrespective of level of cost to the consumer in claiming it. This interpretation is stricter than that given by the High Court.

Penalties for the offences

Any trader found to be carrying out any of the unfair trading practices described in the CPUTR 2008 will be subject to a fine or two years' imprisonment or both (see Table 11.6), as provided by regs 8–12.

Table 11.6 Offences and sanctions under regs 8–12

Offence	Relevant sanction
Generally prohibited practices	reg. 8(1)(a) Any trader convicted on indictment will be subject to a fine or two years' maximum imprisonment or both
Misleading actions	reg. 9: sanctions as for reg. 8 above
Misleading omissions	reg. 10: sanctions as for reg. 8 above
Aggressive commercial practices	reg. 11: sanctions as for reg. 8 above
Sched. 1 practice	reg. 12: sanctions as for reg. 8 above.

Exam tip

When you discuss defences in your assessment, you should point out that reg. 17 reflects the defence given in s. 24(1) TDA 1968. Case law that was decided under this Act should be used to illustrate the operation of the defence of 'due diligence'. Indicate how the defence under s. 24(1) was used by defendants charged under s. 14 TDA 1968 in relation to falsely described services, and by those charged under s. 1(1)(b) for supplying goods with a false description. Also, point out that the defence does not apply to any offences listed under Sched. 1 to the regulations.

Defences

Defences are given to unfair trading practices in regs 17 and 18.

Due diligence defence under reg. 17

A trader will have a defence to all offences, except those in reg. 8 and Paragraphs 11 and 28 of Sched. 1, where the commission of an offence was due to:

- a mistake.
- reliance on information provided by another.
- the act or default of another.
- an accident.
- another cause beyond his control.

Moreover, the trader will have to show that he took all reasonable precautions and exercised due diligence to avoid the offence being committed in the first place.

Tesco Supermarkets Ltd v *Nattrass* [1972] AC 153

Facts

A supermarket was running an offer on special packs of washing powder at a discounted price and displayed an advertisement to this effect within the store. When they sold out, an employee re-stacked the shelves with ordinary packs of the same brand, but his manager failed to remove the advertisement. A customer, having been charged the full price for the powder, complained to the public authorities, whereon the supermarket was duly charged with s. 1(1)(b) TDA 1968.

Legal principle

As the manager had committed the offence, the House of Lords accepted the defence of 'default of another', under s. 24. The store could not have been at fault, since they had taken all reasonable steps in establishing effective pricing checks.

Analysis

It is important to understand that in this case the manager did not reflect the control and will of the company because the company had done all it could to avoid committing the offence.

Innocent publication of an advertisement defence under reg. 18

This is the same as the s. 25 defence in the TDA 1968, and s. 24 of the CPA 1987 that concerns advertising and prices. A defence will be open to a trader, as long as they can prove that they are in the business of publishing advertisements in the ordinary course of business. Furthermore, a trader would also have to prove that they published the advertisement unaware that it would infringe the CPUTR 2008.

Enforcement powers under Part 4 of the regulations

Criminalisation of trading activity was not a requirement of the Unfair Commercial Practices Directive 2005/29/EC; the UK instead chose to create offences as sanctions for 'rogue traders'. The primary enforcement tool is enforcement orders under s. 214 Enterprise Act 2002 in respect of Community infringements. A duty of enforcement is given to the Office of Fair Trading and all local weights and measures authorities. Under Part 4 CPUTR 2008 the enforcers can make test purchases, enter premises with or without a warrant, seize goods, conduct an investigation and institute a prosecution. Any trader who is found not guilty, though, will be entitled to compensation from the OFT.

The Enterprise Act (Part 8 Domestic Infringements) Order 2003 listed a number of Acts and Community instruments that qualify as subject to 'domestic' as well as 'Community' infringements. Breaches of the regulations are now represented as Community infringements within the ambit of the Enterprise Act 2002.

Enforcement powers under the Enterprise Act 2002, Part 8

Part 8 of the Enterprise Act 2002 (EA) enables general or designated enforcers to apply for enforcement orders to prohibit infringements of domestic or Community legislation that harm the collective interests of consumers. A **consumer transaction** under s. 210 of the EA 2002 is one in which 'goods or services are . . . supplied to the individual (whether by sale or otherwise) in the course of a business' where 'the individual receives . . . the goods or services otherwise than in the course of a business'. Thus under the EA 2002 a consumer is defined in terms of the nature of a transaction between parties.

Before applying for an enforcement order, the relevant enforcement authority as authorised by the CMA under s. 213 of the EA 2002, usually the Trading Standards Service, must consult with a trader who is guilty of an infringement, except in cases where they consider enforcement must be made immediately. The main purpose of the consultation is to elicit an undertaking from the trader that they will desist from their deceptive behaviour; otherwise the relevant enforcement authority will use its power to apply for an enforcement order.

Reform of the CPUTR 2008

While the Consumer Protection from Unfair Trading Regulations 2008 made it a criminal offence to use misleading or aggressive commercial practices, consumers were left with no private right of redress against the trader, unless they sued for misrepresentation or breach of contract. The Consumer Protection (Amendment) Regulations 2014, which give consumers new rights of civil redress, stem from the recommendations made by the Law Commission after a review of the shortcomings of the CPUTR 2008. The 2014 Regulations have inserted Part 4A reg. 27 into the CPUTR 2008 to provide for these rights of civil redress (see Table 11.8). Only consumers who took a 'transactional decision' following a misleading or aggressive practice can obtain private redress under the new regulations and in order to gain redress a consumer must show that the trader's behaviour had a *significant influence* on the consumer's decision to enter into a contract or make a payment.

Exclusions

The new regulations do not cover transactions concerning:

- real property or social housing (but do apply to relevant leases, i.e. assured tenancies and holiday lets (reg. 27C(2)).
- financial services, e.g. pensions, mortgages, insurance and banking (reg. 27D(1),(3)).
- credit agreements, except 'restricted-use credit agreements', where the debtor has to use the credit for a specific purpose (see reg. 27D(2)).

A list of the types of actions that could be deemed as misleading or aggressive is given below in Table 11.7.

Table 11.7 Types of commercial transactions affected by misleading/aggressive practices

Type of transaction	Example
A business-to-consumer contract	A broadband provider offering a contract with an exaggerated broadband speed
A consumer-to-business contract	A consumer sells gold to a dealer who falsely undervalues the gold
Consumer payments	A car-parking enforcement firm demands a fine without properly identifying its charges, or its company contact details, by clear signage

Table 11.8 Civil remedies for the consumer

Standard Remedies (reg. 27F/G/H/I)	No evidence of loss required
Right to unwind and claim a refund of the price (reg. 27F/G)	Must be exercised within 90 days from the start of the contract
Right to a discount (reg. 27I)	Consumer affirms the contract and receives a discount on the price
Damages for detriment (reg. 27J)	**Evidence of actual loss required**
The consumer's losses exceed the price paid for the goods and/or services	Damages can be claimed for distress and inconvenience as well as consequential financial loss

Impress your examiner

Of course, it is worth pointing out that under reg. 27K a consumer who wishes to enforce civil rights of redress still has to bring a claim in civil proceedings, albeit under the CPUTR 2008 rather than the Misrepresentation Act 1967, the Sale of Goods Act 1979 or the Sale and Supply of Goods Act 1982. By pursuing a right to unwind or a discount under the CPUTR 2008 the consumer will not have the burden of proving loss. However, in claiming damages for detriment, the consumer must show actual loss and under reg. 27J(5) the trader may have a defence.

Consumer Protection from Unfair Trading Regulations 2008, reg. 27J(5)

(5) A consumer does not have the right to damages if the trader proves that –

(a) the occurrence of the prohibited practice in question was due to –

(i) a mistake,

(ii) reliance on information supplied . . . by another person,

(iii) the act or default of a person other than the trader,

(iv) an accident, or

(v) another cause beyond the trader's control, and

(b) the trader took all reasonable precautions and exercised due diligence to avoid the occurrence of the prohibited practice.

Business Protection from Misleading Marketing Regulations 2008

Businesses lost their protection when the Control of Misleading Advertisements Regulations 1988 and most of the Trade Descriptions Act 1968 were repealed. Due to the lack of protection against misleading and comparative advertising, further regulations had to be introduced in the Business Protection from Misleading Marketing Regulations 2008 (see Table 11.9).

Table 11.9 Business Protection from Misleading Marketing Regulations 2008, Summary

Content	Explanation
Part 1: Prohibition of misleading advertising	Prohibits misleading advertising and gives the conditions under which comparative advertising is allowed. Requires that Code Owners (responsible for Codes of Practice) should not promote misleading advertising or comparative advertising that is banned
Part 2: Criminal offences and defences	Fine or up to two years' imprisonment if convicted on indictment. Defences of due diligence and innocent publication are provided

Content	Explanation
Part 3: Enforcement duties	The enforcement authorities include: the OFT, local weights and measures authorities and the Northern Irish Department of Enterprise, Trade and Investment. These enforcers are empowered to apply for an injunction to secure compliance with the regulations
Part 4: Additional powers for enforcement authorities	Include investigations into possible breaches of the regulations, test purchases and entry into premises with or without a warrant

Putting it all together

Sample question

Could you answer this question? Below is a typical problem question that could arise on this topic. Additionally, a sample essay question and guidance on tackling it can be found on the companion website.

Problem question

Miss Fit owns a hotel that offers 'Tone-up Weekend Breaks' for clients who wish to improve their health and fitness. The hotel brochure lists a swimming pool, sauna, steam room and a hot tub among their amenities. Worryingly, she received a letter of complaint from Max Moan, who claimed that he was unable to use some of these facilities over the weekend of his stay. Certainly the hot tub had been closed for cleaning, and worse still, the pool was out of use due to its closure by Environmental Health. Consequently, Mr Moan is threatening to report the hotel to the Trading Standards Service.

What advice would you give to Miss Fit regarding:

(a) criminal liability for unfair trading practices?

(b) any possible defences available to her?

(c) powers of enforcement available to the relevant authorities?

Answer guidelines

Approaching the question

You are asked to advise Miss Fit regarding *criminal* rather than *civil* liability, powers of enforcement and possible defences. You will need to apply the relevant provisions of the Consumer Protection from Unfair Trading Regulations 2008 to each issue in turn.

Important points to include

- Have you outlined the aim of the UCPD?
- With regard to liability, identify Miss Fit as a trader undertaking a commercial practice.
- Define commercial practice.
- Explain the five potential offences listed in the regulations.
- Is this commercial practice unfair according to any of these offences?
- Is the practice a misleading action, omission or listed under Sch.1?
- Consider whether Mr Moan is an average consumer and, if so, if he has been targeted.
- As regards defences, explain and apply the defence of due diligence.

With regard to enforcement, outline the duties given under Part 4 CPUTR 2008 as well as the ability to apply for enforcement orders under Part 8 of the Enterprise Act 2002.

Note: As the question concerns criminal liability, there is no need to address civil redress.

Impress your examiner

Explain terms like professional diligence, material distortion and average consumer before identifying a possible offence. Apply the guidelines given by the regulations to the scenario in deciding whether a practice can be categorised as unfair. When considering enforcement powers, explain that it was not a requirement of the UCPD 2005 that unfair trading practices be criminalised; that was the choice of the UK Government. When considering defences, apply the previous case law to indicate that the new defences mirror those in previous legislation.

Key case summary

Key case	How to use	Related topics
Office of Fair Trading v *Ashbourne Management Services Ltd* [2011] EWHC 1237	To give an example of aggressive trading practices	Breach of professional diligence under reg. 3 and misleading action under reg. 5 CPUTR 2008
R v *X* [2013] EWCA Crim 818	To show how Para. 12, Sch. 1 of CPUTR 2008 applies	Targeted vulnerable consumers. Breach of reg. 3 CPUTR 2008
Office of Fair Trading v *Purely Creative Ltd* [2011] EWHC 106 (Ch)	To give an example of breach of Para. 31, Sched. 1 reg. 5 and 6 of CPUTR 2008	Breach of s. 13 SGA 1979. Misrepresentation under s. 2(1) of the Misrepresentation Act 1967
Tesco Supermarkets Ltd v *Nattrass* [1972] AC 153	To illustrate the use of the defence of default of another	Product safety: Part II, s. 39 CPA 1987, GPSR 2005, reg. 29
Warwickshire CC v *Halfords Autocentres Ltd & Competition and Markets Authority* [2018] EWHC 3007 (Admin)	To clarify the definition of commercial practice and the range of consumer protection under the CPUTR 2008	Definition of consumer; regulation of consumer protection

Key further reading

Key articles/reports	How to use	Related topics
Cartwright, P. (1996) Reckless Statements, Trade Descriptions and Law Reform, *Northern Ireland Legal Quarterly* 47 171.	To discuss the meanings of recklessness in consumer protection	Enforcement of consumer protection legislation
Griffiths, M. (2007) Unfair Commercial Practices – A New Regime, *Communications Law* 196.	To analyse the provisions of UCPD 2005/29/EC on unfair commercial practices	CPUTR 2008; misrepresentation

Key articles/reports	How to use	Related topics
Twigg-Flesner, C. *et al.* (2005) *An Analysis of the Application and Scope of the Unfair Commercial Practices Directive*, DTI Report.	To outline the aims of the UCPD 2005/29/EC for control of unfair commercial practices and to what extent it may achieve its aims	CPUTR 2008
Consumer Protection: Guidance on the CMA's approach to use of its consumer powers CMA 58, August 2016.	To summarise enforcement powers and how authorities should use them	Unfair contract terms, product safety, regulation
OFT/BERR (2008) Consumer Protection from Unfair Trading: Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive, OFT 1008.	To give an outline and interpretation of the CPUTR 2008 and a comparison with the provisions of the UCPD 2005	Regulation, enforcement
BIS (2014) Misleading and aggressive commercial practices: New private right for consumers. Guidance on the Consumer Protection (Amendment) Regulations 2014, BIS 14/1030.	To summarise the reforms to the CPUTR 2008	Remedies for breach of contract

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Glossary of terms

The glossary is divided into two parts: key definitions and other useful terms. The key definitions are often explained within the chapter in which they occur, but can also be found in the glossary below. These definitions are the essential terms that you must know and understand to prepare for an exam. The additional list of terms provides further definitions of useful terms and phrases which will also help you answer exam and coursework questions effectively. These terms are highlighted in the text as they occur but the definition can only be found here.

Key definitions

An agent	He who acts through another acts for himself: *qui facit per alium, facit per se.*
Ascertained goods	Goods become ascertained once they have been identified and agreed upon, after the contract of sale.
A title or a right of ownership	An owner has exclusive rights and control over their property. The property in the goods is an example of a right of ownership.
Bill of exchange	A negotiable instrument that is similar to a cheque. A person orders their bank to pay the bearer a fixed sum of money, but on a specific date.
Business liability	Liability incurred by a person acting within the course of a business (s. 1(3) UCTA 1977).
Cancellable agreement	This is an agreement signed by a debtor away from the trade premises of the creditor or supplier, which may be cancelled as long as it was not secured on land.
Caveat emptor	Let the buyer beware.
Consideration	What each party gives to another in an agreement: usually the price for which a promise is bought.

Consumer credit agreement	An agreement between an individual (the debtor) and any other person (the creditor) by which the creditor provides the debtor with credit of any amount.
Consumer transaction	This is a transaction whereby a consumer deals with another party who is carrying out their trade or business.
'Consumer transaction' under the Enterprise Act 2002, s. 210	(1) Where goods or services are . . . supplied to the individual (whether by sale or otherwise) in the course of a business; and (2) the individual receives . . . the goods or services otherwise than in the course of a business.
Contra proferentem	In cases where a court determines a *term* to be ambiguous, a contractual interpretation will be construed against the interests of the party who insisted on its inclusion in the agreement.
Core terms	These are terms that either define the subject matter of a contract, or are concerned with the adequacy of the contract price.
'Damage' under s. 5 CPA 1987	(1) Death or personal injury caused by the defect. (2) Damage to property (non-business use only) worth more than £275. (3) Not the damaged product itself.
Disclosed principal	A principal is disclosed when he is named or when the agent indicates that he is acting on behalf of a principal.
Distance contract	One which is between a supplier acting for commercial or professional purposes and a *consumer* who is a natural person acting for purposes outside his business. It must concern goods or services and be conducted under an *organised distance sales or service scheme* run by the supplier. Finally, the supplier must make exclusive use of distance communications such as telephone, fax, television, letter, email, internet, up to and at the time the contract is made.
Distributor under reg. 2 GPS Regulations 2005	One who knowingly supplies a product that is patently unsafe.
Exclusion or exemption clause	A term or notice that attempts to exclude or restrict liability for one's acts or omissions.
Expectation loss	Damages that aim to fulfil a contract by placing a party in the position they would have been in were the contract carried out, which may include loss of expected profits.
Express terms	Terms that are written or spoken.

***Force majeure* clause**	A clause which allocates risk in the event of something that might happen.
Harmonise	To make laws the same or similar.
Hire purchase	A person, otherwise known as a *bailee*, agrees to hire goods on credit terms for a fixed period of time, with an option to buy (for a nominal fee) at the end of the agreed period.
Implied terms	Terms that are not written or spoken, but implied in a variety of ways.
Legal intent	Where both parties intend the agreement to have legal effect.
Lien	The right to hold on to the property of another and keep it as security until an obligation has been performed.
'Material distortion of average consumer's economic behaviour' under CPUTR 2008	To impair the average consumer's ability to make an informed decision, thereby causing him to take a transactional decision that he would not have otherwise taken (reg. 2(1)).
Maximum harmonisation	A common standard to adhere to is set for all Member States of the EU. A standard fixed to ensure complete equality of legal provision.
Nemo dat quod non habet	No one can sell what he does not have.
Non-commercial agreement	A consumer credit or hire agreement not made by a creditor or owner in the course of a business carried out by him.
Personal remedies	Remedies sought personally against the buyer for compensation of loss.
Producer under reg. 2 of GPS Regulations 2005 and Product Liability Directive	A manufacturer or one holding himself out as a manufacturer, own-brander, re-conditioner, importer or agent.
'Professional diligence' under CPUTR 2008	The standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with either: (a) honest market practice in the trader's field . . .; or (b) the general principle of good faith in the trader's field . . .
Real remedies	Remedies sought against the goods themselves, so they may be retained by the seller.
Reliance loss	Damages to put a party back into a pre-contractual position to compensate for out-of-pocket losses.

Repudiate	A person shows by words or conduct that they do not see themselves as being bound by a contractual obligation. An example is where a person refuses to perform according to the terms of a contract.
Rescission	Sets the contract aside and restores parties to pre-contractual position.
Safe	Dangers posed by the goods themselves rather than their quality (CPA 1987, Pt II, s. 19).
'Service provider' under the Electronic Commerce Regulations 2002	A broad definition is given by reg. 2(1) to include: '. . . any service normally provided for remuneration at a distance by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service'.
Severable contract	This term refers to a contract that can be divided individually with each part being treated separately.
Trader (under reg. 2)	This includes any natural or legal person 'acting for purposes relating to his trade, business, craft or profession'.
Unascertained goods	Any goods that have not been identified and agreed upon at the time of the contract are considered to be unascertained, including those chosen from an identified bulk.
Undisclosed principal	A principal is undisclosed when the agent does not reveal that he is acting on behalf of a principal.
Unsolicited goods	Unrequested goods sent to the *offeree* without their consent.
Void	Has no legal effect.

Other useful terms

Acceptance	An unconditional acceptance of all the terms of an offer.
Condition	A term that goes to the root of a contract, the breach of which allows the other party to end the contract.
Fiduciary	A person who, in a position of trust, acts on behalf of another.
Indemnify	To make good a loss which a person has suffered because of the act or default of another.
Inertia selling	This is when a business tries to sell a product to a consumer by sending them unsolicited goods.
Misrepresentation	A false statement of *fact* made to *induce* a party into a contract.

Mitigate	A duty to act reasonably, for example, to reduce one's losses in a contractual claim.
Offer	An expression of willingness to be legally bound.
Privity of contract	A rule whereby only the parties to a contract can enforce rights or obligations under that contract.
'Producer' under s. 1(2) CPA 1987	A producer of the product; an own-brander; a business importer of goods from outside the EU; anyone subjecting agricultural produce to an industrial process.
'Product' under s. 1(2) CPA 1987	'. . . any goods or electricity [including] a product which is comprised in another product as a component or raw material'.
Regulated agreement	A consumer credit or hire agreement which is not exempt under the Consumer Credit Act 1974.
Rescind	Relieve the parties of any further obligation to perform the contract.
Reservation of title clause	A clause whereby the seller of goods can reserve property rights over the goods.
Restricted-use credit	Credit is supplied by the creditor to a supplier for a specific use.
Right to unwind	Where within 90 days entering into a commercial transaction a consumer treats the contract as ended and returns goods and receives refunds.
Romalpa clause	Retention of title clauses: provide the seller with the power to retain ownership of goods until they have been paid for by the buyer.
Running-account credit	Credit is supplied indefinitely up to a limited amount and can be used by the debtor for several contracts as long as the debtor makes regular (monthly) repayments.
Unrestricted-use credit	Credit is given by the creditor direct to the debtor for either a specific or non-specific use.
Voidable	Where a contract is capable of being set aside by one party. Until that party elects to set it aside, the contract has full legal effect.
Warranty	In a contract this is a term which, if breached, gives rise to a claim in damages rather than the right to end the contract.

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Note: **Emboldened** entries refer to those appearing in the glossary.

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